SUPREME COURT, U.S.
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27224

DESIGNATED RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. [illegible]

THOMAS F. [illegible], Petitioner

v.

STATE OF OKLAHOMA

IN ERROR TO THE [illegible] COURT OF THE STATE OF OKLAHOMA

27225

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 246.

THOMAS P. QUEENAN, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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1 In the Supreme Court of the United States.

THOMAS P. QUEENAN, PLAINTIFF IN ERROR,
vs.
TERRITORY OF OKLAHOMA, DEFENDANT IN ERROR.

The said plaintiff in error hereby files with the clerk of said court the following statement of the errors on which he intends to rely in said cause, and of the parts of the record therein which he thinks necessary for the consideration thereof, to wit:

Statement of errors. In the Supreme Court of the United States.

THOMAS P. QUEENAN, PLAINTIFF IN ERROR,
vs.
TERRITORY OF OKLAHOMA, DEFENDANT IN ERROR.

ASSIGNMENT OF ERRORS.

Comes now said Thomas P. Queenan, plaintiff in error, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:

First. The court erred in affirming the action and judgment of the court below, the district court.

Second. The court erred in denying the petition of plaintiff in error for a rehearing of said cause.

2 Third. The court erred in holding that the juror, J. T. Harper, was a qualified juror.

Fourth. The court erred in holding that the plaintiff in error waived the disqualification of the juror, J. T. Harper.

Fifth. The court erred in holding that the irregularity in the special venire was waived by plaintiff in error.

Sixth. The court erred in holding that the testimony of nonexperts as to how the language and conduct of the accused effected them was properly excluded by the trial court.

Seventh. The court erred in holding that the opinion of nonexpert witnesses as to mental condition should be confined to the opinion formed before the homicide, and in overlooking the ruling of the trial court on this question as made in the case of the testimony of Witness John H. Beaty.

Eighth. The court erred in holding that instruction numbered five given by the trial court correctly states the law.

Ninth. The court erred in holding that the other instructions excepted to by plaintiff in error correctly stated the law.

Wherefore, the said Thomas P. Queenan prays that the order of said supreme court of the Territory of Oklahoma be reversed and said cause remanded for further proceedings and the correction of said errors.

THOMAS P. QUEENAN,
Plaintiff in Error,

By J. W. JOHNSON,
C. B. AMES,
H. H. HOWARD,
His Attorneys.

PARTS OF THE RECORD.

1. The petition for writ of error, as follows:

3 In the supreme court of the Territory of Oklahoma.

THOMAS P. QUEENAN, PLAINTIFF IN error, *vs.* TERRITORY OF OKLAHOMA, DEFENDANT in error.	Petition for writ of error.

To the Honorable BAYARD T. HAINER, *a justice of the supreme court of the Territory of Oklahoma*:

Thomas P. Queenan, your petitioner, comes and respectfully represents that, in the supreme court of the Territory of Oklahoma, in a certain cause therein lately pending, wherein your petitioner was the plaintiff in error and said Territory of Oklahoma was the defendant in error, a final judgment was rendered by said court affirming the judgment entered in said cause by the district court of said Territory within and for Oklahoma County therein, which said judgment in said district court was upon a verdict of a jury, finding plaintiff in error guilty of murder, and pronouncing a sentence of death upon and against him; that there is manifest error committed by said supreme court of the Territory of Oklahoma in said cause to the prejudice of plaintiff in error, which said errors will more fully appear from the assignment thereof, a true copy of which is hereto attached and made a part hereof.

Your petitioner further shows that said supreme court is the court of last resort or highest court in said Territory in which a decision in said cause could be had; and that said cause is a case of conviction of a capital crime and one in which the death penalty is imposed.

Wherefore, the petitioner prays that a writ of error may issue in his behalf to the supreme court of said Territory of Oklahoma, and that a transcript of the records, papers, and proceedings in said cause, duly authenticated, may be sent to the Supreme Court of the United States that such errors may be corrected, and that the petitioner may be granted a supersedeas and stay of execution pending such writ of error.

THOMAS P. QUEENAN,
Plaintiff in Error,

By J. W. JOHNSON,
C. B. AMES,
H. H. HOWARD,
His Attorneys.

4 2. The writ of error herein, as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the justices of the supreme court of the Territory of Oklahoma, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court of the Territory of Oklahoma, before you or some of you, being the highest court of law and

equity of said Territory in which a decision could be had in the said cause or suit between Thomas P. Queenan as plaintiff in error and the Territory of Oklahoma as defendant in error, which is a case of conviction of a capital crime and it being alleged that a manifest error hath happened to the great damage of said Thomas P. Queenan, as is said and by his complaint appears:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington at the said Supreme Court of the United States within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, which of right, and according to the law and customs of the United States, ought to and should be done.

And it is hereby ordered that this writ operate as a supersedeas and stay of execution and proceedings in said cause pending such writ of error.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of January, in the year of our Lord one thousand nine hundred and two.

The foregoing writ is hereby allowed.

BAYARD T. HAINER,
Justice of the Supreme Court of the Territory of Oklahoma.

5 3. The citation herein as follows:

THE UNITED STATES OF AMERICA, OKLAHOMA COUNTY, ss.

The President of the United States to the Territory of Oklahoma, greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington on the 26th day of February, 1902, at a term of said court to be holden then and there, pursuant to a writ of error, filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein Thomas P. Queenan is plaintiff in error and the Territory of Oklahoma is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this — day of February, in the year of our Lord one thousand nine hundred and two.

_____ _____,
Justice of the Supreme Court of the Territory of Oklahoma.

Attest:

_____ _____,
Clerk of the Supreme Court of the Territory of Oklahoma.

6 4. The petition in error in the supreme court of the Territory of Oklahoma, as follows:

In the supreme court of the Territory of Oklahoma.

THOMAS P. QUEENAN, PLAINTIFF IN ERROR,
vs.
TERRITORY OF OKLAHOMA, DEFENDANT IN ERROR. } Petition in error.

Comes now the said plaintiff in error, and complains of the said defendant in error, for that,

At the February, 1901, term of the district court of said Territory, within and for Oklahoma County, in the third judicial district, judgment was rendered therein, by the consideration of the said court, against him, said Thomas P. Queenan, in a certain action then and therein pending, wherein said Territory of Oklahoma was plaintiff and said Thomas P. Queenan was defendant, by which said Thomas P. Queenan was adjudged and sentenced to suffer the penalty of death, the original transcript and case-made, duly certified, settled and signed, being hereto attached, marked "Exhibit A," and made a part hereof.

The said plaintiff in error avers and alleges that there is error in the said proceedings, record, and case-made in the following particulars, to wit:

1. The said district court erred in overruling and denying the motion of plaintiff in error for a new trial in said cause.

2. The said district court erred in denying and overruling his motion in arrest of judgment.

3. The said district court erred in overruling his motion to quash the indictment in said action.

4. The said district court erred in overruling and denying his demurrer to the indictment in said cause.

7 5. The said court erred in giving certain instructions in charge to the jury; among them those numbered 1, 5, 7, 8, 9, 11, 12, 13, and 16.

6. The said court erred in refusing to give in charge to the jury certain instructions requested by said Thomas P. Queenan, to wit, those refused and numbered 1, 2, 3, 4, 4½, 4¼, 4¾, 5, and 6.

7. The said court erred in admitting incompetent and irrelevant evidence on the part of the defendant in error and over the objection of the plaintiff in error.

8. The said court erred in refusing to receive competent and relevant evidence on the part of the plaintiff in error.

9. The said court erred in refusing to allow witnesses to testify as to their opinion of the mental condition of plaintiff in error at the time of the alleged offense, which opinions such witnesses had formed or entertained after such alleged offense was committed.

10. The court erred in permitting the use of improper and injurious statements by counsel for defendant in error to the jury, and in refusing attorneys for plaintiff in error to make proper and reasonable statements and illustrations to the jury.

Wherefore the plaintiff in error prays that said judgment and sentence may be set aside and reversed, and for all proper relief.

THOMAS P. QUEENAN,
Plaintiff in Error.

By J. W. JOHNSON, HOWARD & AMES,
His Attorneys.

8 5. The indictment, as follows:

THE TERRITORY OF OKLAHOMA,
vs.
T. P. QUEENAN, DEFENDANT. } Indictment.

At the February term, a term of the district court of the third judicial district of the Territory of Oklahoma, held in and for Oklahoma County, in the Territory of Oklahoma, at the city of Oklahoma City, and begun on the 5th day of February, in the year of our Lord one thousand nine hundred (1900), the jurors of the grand jury of said county, good and lawful men, then and there returned, tried, empaneled, sworn, and charged, according to law, to diligently inquire into and true presentment make of all public offenses against said Territory of Oklahoma, committed or triable within said county, upon their said oaths, in the name and by the authority of said Territory of Oklahoma, do present and find that in said county of Oklahoma, in said Territory of Oklahoma, on the 27th day of January, in the year of our Lord one thousand nine hundred (1900), one T. P. Queenan did then and there, with force and arms, in and upon one Ella Queenan then and there being, feloniously, purposely, and of his deliberate and premeditated malice aforethought, without any authority of law and with a premeditated design and intent to effect the death of her, the said Ella Queenan, make and assault with a deadly weapon to wit, a certain revolver in the hands of him, the said T. P. Queenan, then and there feloniously, wilfully, purposely, and of his deliberate and premeditated malice aforethought, had and held, and which said revolver was then and there loaded and charged with gunpowder and leaden bullets; and the said T. P. Queenan, then and there the leaden bullets aforesaid, out of the revolver aforesaid, feloniously, wilfully, purposely, and of his deliberate and premeditated malice aforethought, and without any authority of law, and with a premeditated design and intent, then and there, to effect the death of her, the said Ella Queenan, did discharge and shoot off, to, at, and against and into the body of her, the said Ella Queenan, at the place aforesaid; and that the said T. P. Queenan, with the leaden bullets aforesaid, by him, the said T. P. Queenan, discharged and shot off, as aforesaid, out of the revolver aforesaid, so had and held in the hand of the said T. P. Queenan as aforesaid, then and there, at the time and place aforesaid, and thereby feloniously, wilfully, purposely, and of his deliberate and premeditated malice aforethought, and without any authority of law, and with the premeditated design and intent to effect the death of her, the said Ella Queenan, the said Ella Queenan did strike, penetrate, and wound, in and upon the body of her, the said Ella Queenan, and then and there and thereby giving to her, the said Ella Queenan, one mortal wound, of
9 which said mortal wound she, the said Ella Queenan, then and there instantly died; and so the grand jurors aforesaid, upon their

oaths aforesaid, do say: That the said T. P. Queenan, her the said Ella Queenan, in the manner and form and at the time and by the means aforesaid, and at the place aforesaid, feloniously, wilfully, purposely, and of his deliberate and premeditated malice and without any authority of law and with a premeditated design and with the intent to effect the death of her, the said Ella Queenan, her, the said Ella Queenan, did kill and murder contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the Territory of Oklahoma

W. R. TAYLOR,
County Attorney in and for said County.

10 6. The venire for sixty jurors, found on pages 13 and 14 of the record, together with the return of the officer thereto, as follows:

Venire for sixty jurors.

UNITED STATES OF AMERICA,
Territory of Oklahoma, Oklahoma County, ss:

To the Sheriff of Oklahoma County:

You are hereby commanded to summon sixty good and lawful men, residents of said county and Territory aforesaid, having the proper qualifications, to personally be and appear before the district court of the third judicial district of Oklahoma Territory at the court-house at Oklahoma City, in said county aforesaid, on the forthwith day of said day, to serve as petit jurors at the Feb., 1900, term of said court in the case of Territory vs. T. P. Queenan, and not depart without leave of court.

You will make due return of this writ, with your doings thereon, to the clerk of said court before the date last above written.

Witness my hand and the seal of the court this 6 day of March, 1900.

[SEAL.] B. D. SHEAR, *Clerk District Court.*

[Endorsed:]

No. 832. Territory vs. T. P. Queenan. Jury venire. Filed this 8th day of March, 1900. B. D. Shear, clerk district court, by M. McKinley, deputy.

Received this writ on the 6th day of March, 1900, and executed the same by summoning sixty men on the 6th, 7th, and one on the 8 h of March, 1900, and directing them to report at court-house in Oklahoma City, O. T., forthwith.

G. W. COPELAND, *Sheriff,*
By J. T. BROWN, *Under Sheriff.*

Samuel Adams,	Eugene Joy,	George Comp,
W. H. Link,	J. W. Young,	W. E. Moore,
R. E. Dickey,	J. W. Wittenzlner,	V. H. McCoy,
S. J. Rice,	S. D. Doxsie,	L. C. Reder,
A. A. Rand,	John Bennet,	W. H. Berkstresser,
W. A. Williams,	C. W. Schriver,	T. B. Elliot,
C. L. Weiss,	Frank Oldham,	G. C. Foster,
P. C. Duncan,	O. B. Simmonds,	J. N. Bates,
G. W. Moore,	J. A. Ryther,	M. Fozer,

J. T. Harmon,
E. Hiatt,
Galvin Ogilbee,
I. Dowart,
Robert C. Lewis,
J. F. Keosling,
T. M. Duncan,
A. V. Pain,
J. H. Keely,
C. T. Dawson,
J. H. White,
Chas. Schiosser,
James Rogers,
J. E. Queen,
John F. Summer,
John A. Ensinnger,
F. H. Montgomery,
W. H. Oder,
L. P. Newkirk,
I. J. Cheek,
F. F. Crabb,
M. W. Rogers,
J. A. Kirby,
G. G. Frain,
W. E. Augerman,
W. R. Fithion,
H. S. Montgomery,
T. M. Kennard,
W. D. Hughes,
L. L. Nunn,
C. E. Burnworth,
F. T. Crabb,
J. W. Shepperd,
W. H. Stewart.

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7. The examination of the juror J. F. Harper, found on pages 234 to 240 of the record, as follows:

J. F. HARPER, being called into the box and duly sworn, answered as follows:

By the COURT. Are you a citizen of the United States?

A. I am.

Q. Of the Territory of Oklahoma?

A. Yes, sir.

Q. And of Oklahoma County?

A. I am.

Q. Are you a voter in the precinct in which you live?

A. Yes, sir.

Q. Are you a minister of the gospel?

A. No, sir.

Q. Are you a practicing physician or a teacher in the public schools?

A. No, sir.

Q. Are you a postmaster or carrier of the United States mail?

A. No, sir.

Q. Are you a deputy sheriff, or a coroner, or jailer?

A. No, sir.

Q. Are you a licensed attorney engaged in the active practice?

A. I am not.

Q. Are you licensed to sell liquors?

A. No, sir.

Q. Are you an habitual drunkard?

A. No, sir.

12

Q. Are you suffering from any bodily infirmity amounting to a disability?

A. I am not.

Q. Have you ever been convicted of a felony under the laws of the United States or of any State or Territory?

A. No, sir.

By Mr. TAYLOR. You haven't heard a statement of this case, have you?

A. No, sir.

Q. You were just summoned last night or this morning?

A. Last night.

Q. This is a prosecution on the part of the Territory of Oklahoma against Thomas P. Queenan, wherein he is charged with having killed

his wife on or about the 27th day of last January. This being an offense punishable by death, do you entertain such conscientious opinions as would preclude you from finding the defendant guilty and assessing the death penalty?

A. I don't understand you.

Q. Have you any conscientious scruples against assessing or inflicting the death penalty, in a proper case, for the crime of murder, if the law and the evidence warranted it or justified it?

A. I don't believe in capital punishment.

Q. You don't believe in it?

A. No, sir.

Q. Is it a matter of conscience with you?

A. Yes, sir.

Q. You don't believe in the infliction of the death penalty as a punishment for the commission of crime?

A. No, sir.

Q. You are conscientiously opposed to inflicting the death penalty?

A. Yes, sir.

Q. In proper cases?

A. Yes, sir.

(The Territory challenges the juror for cause.)

By Mr. AMES. Are there any crimes at all for which you think the death penalty should be inflicted?

A. No, sir; I don't believe there are.

Q. You don't think the death penalty ought ever to be inflicted for murder under any circumstances?

A. I do not know.

Q. You think it ought to be inflicted under some circumstances, do you?

A. Yes; I don't know but what there are some circumstances where it ought to be.

13 Mr. JOHNSON. We resist the challenge.

By the COURT. You think it ought to be, under some circumstances?

A. Yes, sir.

Q. Now, answer this question: Do you entertain such conscientious opinions as would prevent you from returning a verdict of guilty and assessing the death penalty where the evidence, in your judgment, would justify it?

A. No, sir; I believe not.

Q. How is that?

A. I believe not. I believe, if the evidence justified it, I have not.

Q. If the evidence justifies it, you would be willing to return a verdict of guilty and fix the punishment at death?

A. Yes, sir.

(The challenge is overruled by the court.)

By the TERRITORY. Do you mean, then, that there are certain instances of murder where, in your opinion, you might inflict the death penalty, and be justified in doing it?

A. Some cases, yes; but I don't believe in the death penalty.

Q. Supposing it was a case of circumstantial evidence—you would be opposed to the death penalty under circumstantial evidence?

A. Yes, sir.

Q. Do you mean by that if there was not an eyewitness——

(Defendant objects to this line of examination. Objection overruled and defendant excepts.)

Q. Do you mean by that if there was not an eyewitness to the transaction, to the act of the killing itself, that you would be opposed to the infliction of the death penalty?

(To which the defendant objects as incompetent and immaterial. Objection overruled by the court, and the defendant excepts.)

A. Yes, sir; I would.

By the COURT. Mr. Juror, by circumstantial evidence is meant evidence other than that of an eyewitness to the commission of the homicide. Now, do you entertain such conscientious opinions as would preclude you or prevent you from returning a verdict of guilty and assessing the death penalty on circumstantial evidence alone?

(The defendant objects to the question of the court as incompetent. Objection overruled, and to the ruling defendant excepts.)

A. Yes, sir; I would want it to be positive evidence. I wouldn't want to inflict the death penalty on a man on circumstantial evidence.

14 Q. Suppose the circumstantial evidence were such as to exclude every reasonable theory that the defendant could be innocent?

A. Well, that would be positive evidence.

Q. Then, you would consider that as positive evidence?

A. Yes, sir.

By the TERRITORY. Now, you say that you are conscientiously opposed to capital punishment?

Mr. JOHNSON. Objected to for the reason that question has been several times and fully answered.

(Overruled by the court, and defendant excepts.)

Q. Did I understand you correctly that you are conscientiously opposed to capital punishment?

A. Well, not under positive proof.

Q. Well, then, it is not a matter of conscience with you that the death penalty ought not and should not be inflicted?

A. No.

Q. You are not conscientiously opposed to the infliction of the death penalty?

A. Not in all cases.

Q. There are some cases of murder where, in your opinion, the evidence would justify it, that you would believe in the death penalty?

A. Yes, sir.

Q. You believe that it should be done?

A. Yes.

By Mr. FULTON. If the court please, in this case we insist on the objection to this juror, and there seems to be some little difference as to what it takes to constitute a valid objection under these issues, and I want to call the court's attention to a brief authority touching this matter on the question of conscientious scruples——

By the COURT. I know what that rule is. I think the examination of the witness shows that he did not fully comprehend the scope of circumstantial evidence.

By Mr. FULTON. There is some question as to whether circumstantial evidence is positive evidence, and he regards that as positive evidence——

By the COURT. He said if the circumstances were such as to exclude every reasonable doubt of the defendant's innocence that he would call that positive evidence. That was his statement. I have no doubt if he is conscientiously opposed to inflicting the death penalty on circumstantial evidence that he might be excluded. I haven't any doubt about that.

15 Mr. FULTON. This is the point: It is not a question as to what he regards positive evidence, but what is circumstantial evidence.

By the COURT. I think his evidence shows that if the circumstances are such as to exclude every reasonable theory of the defendant's innocence, and such as point to his guilt, that he would be willing to inflict the death penalty. The challenge will be overruled.

By Mr. TAYLOR:

Q. Where do you reside, Mr. Harper?
A. In Pott Township.
Q. How long have you lived there?
A. Seven years.
Q. You came from where to this Territory?
A. Kansas.
Q. What part of Kansas?
A. Reno County.
Q. Have you heard what purports to be the facts in this case?
A. Have I heard of the case?
Q. Yes, sir; have you heard of the case?
A. I think I heard my wife read it in the paper, or read it myself; I forget whether I read it or not.
Q. What paper was that?
A. Times.
Q. Did that paper attempt to detail the circumstances of the case?
A. No, sir; it did not.
Q. Have you ever talked the matter over with anybody?
A. No, sir.
Q. None of your neighbors ever talked with you about it at all?
A. No, sir.
Q. You haven't any opinion with reference to the guilt or innocence of the defendant?
A. No, sir.
Q. You haven't any opinion as to whether or not he killed his wife, have you?
A. No, sir; I can't hardly say that I have. I heard it was so, but I could not say that he did so. I have no opinion.
Q. You mean to say that you heard some one say he did?
A. All I heard of it is what I read in the paper.
Q. From that you haven't any opinion whatever?
A. No, sir; I haven't any opinion.
Q. Did I ask you if you knew the defendant?
A. No, sir.
Q. Do you know him?
A. No, sir.

16 Q. At this time your mind is free and unbiased as to any impression or opinion either for or against the defendant?

A. Yes, sir.

(The Territory passes the juror for cause.)

By Mr. JOHNSON: Mr. Harper, are you acquainted with Mr. Chambers?

A. No, sir.

Q. Are you acquainted with Mr. Taylor, the county attorney?

A. Some.

Q. Acquainted with Mr. Mitchell, the assistant county attorney?

A. No, sir.

Q. Or with Judge Fulton?

A. No, sir.

Q. Has Mr. Taylor ever been your attorney in any matter?

A. I can't say that he has ever been my attorney. I was on a school board once and the township was sued and I counselled him with reference to the matter.

Q. Is he your attorney now in any matter?

A. No, sir.

Q. Is that the only relations you ever had with him—where you consulted him in his official capacity as county attorney, as a member of the school board?

A. Yes, sir.

Q. What is your age?

A. 38.

Q. Are you a man of family?

A. Yes, sir.

Q. Farmer by occupation?

A. Yes, sir.

Q. Has that been your life-time occupation?

A. Yes, sir.

Q. You say you have no opinion about this case at all?

A. No, sir.

Q. Don't know anything about it?

A. No, sir.

Q. Have you any prejudice against the plea of insanity when interposed as a defense by one accused of crime?

A. Well, if I thought it wasn't a just plea, and a sure matter, I would have a prejudice against him.

Q. You would have a prejudice against any falsehood that was presented to you, wouldn't you?

A. Yes, sir.

Q. Have you, from your reading, or otherwise, been induced to believe, or do you believe, that the plea of insanity is at many times interposed by guilty men as a cloak to enable them to escape punishment?

17 A. I have read of such and I believe there are such cases.

Q. Would you, then, if selected as a juror in this case, where the plea of insanity was interposed as a defense, have a prejudice against that defense, and be inclined to believe that it was false?

A. No, I can not say that I would have any prejudice against it, if it was proven.

Q. You mean by that, if you believed it was truthful you would not have any prejudice against it?

A. No, sir; I would not.

Q. You would look upon evidence tending to show the defendant's insanity as fairly an' impartially as you would upon evidence tending to show any other defense that he might have, Mr. Harper?

A. I think so.

(The defendant passes the juror for cause.)

18 8. The reexamination of the jury by the court; found on pages 276 and 277 of the record, as follows:

Mr. JOHNSON. Defendant waives its fifth challenge.

Mr. CHAMBERS. The Territory accepts the jury.

By the COURT. Gentlemen, I want to ask you all some questions, for fear I may have overlooked something. I will propound to you these questions collectively, and you will each answer them separately:

Q. Are either of you a deputy sheriff?

A. All answer in the negative.

Q. Are either of you a coroner?

A. All answer in the negative.

Q. Or a licensed attorney engaged in the active practice?

A. All answer in the negative.

Q. Are any of you licensed liquor dealers?

A. All answer in the negative.

Q. Are any of you habitual drunkards?

A. All answer in the negative.

Q. Are either of you a jailor?

A. All answer in the negative.

Q. Are either of you suffering from any bodily infirmity amounting to a disability?

A. All answer in the negative.

Q. Have any of you ever been convicted of a crime, under the laws of the United States or of any State or Territory?

A. All answer in the negative.

Gentlemen, you may stand up and be sworn to try the case.

Here the clerk swears the jury to try the case.

19 9. The proceedings upon discovery of disqualification of the juror J. F. Harper, after evidence was in for prosecution and defendant had begun to introduce testimony, found on pages 455 to 457, as follows:

Court meets pursuant to adjournment. Defendant present. Jury called by order of the court.

By the COURT. Gentlemen, I am not ready to proceed with the trial this morning. There are some law questions that have arisen in the case that the attorneys wish to investigate, and I will excuse you until 1.30 this afternoon. You will adhere strictly to the admonitions of the court heretofore given you with reference to this case. Remain all together and not separate. Keep your minds free from bias or prejudice either for or against the defendant until after this case shall have been finally submitted to you for your consideration. Be here at 1.30 this afternoon.

1.30, March 12, 1900: Court meets pursuant to adjournment. Defendant present and jury called by order of court.

By the COURT. The matter for which the court took a recess until noon counsel are not fully satisfied upon, and are not ready to proceed with the trial of this case at this time. The probabilities are that there will be nothing further until to-morrow, although I can not tell. I think the case will be taken up in the morning and we will proceed then. At any rate, I am not ready to proceed now. You will not talk among yourselves nor with anyone else about anything connected with this case. Remain all together and not separate. Keep your minds free from bias and prejudice either for or against the defendant until after this case shall have been finally submitted to you for your consideration. Court is here adjourned until 9 o'clock, March 13, 1900.

Court meets pursuant to adjournment. Defendant present and jury is called by order of the court.

By the COURT. Gentlemen, since I sent for you counsel advises me that they desire to present some other matters. I will excuse you for the present. Adhere to the admonitions of the court heretofore given you. You may retire for a few minutes. Remain all together and not separate.

Here the jury retire in charge of the bailiffs.

By Mr. CHAMBERS. If the court please, the prosecution in this case desires at this time to represent to the court and the defendant that since the adjournment of this case on Saturday last information has come to the prosecution that one of the jurors, namely, J. F. Harper, who answered on his voir dire that he had never been convicted of a felony, had, in fact, been convicted of a felony in Pawnee County, Nebraska, during the year 1881, the charge upon which he was convicted being grand larceny. This information being given at this time to the
20 defendant for the purpose of giving him the opportunity of examining into the matter for the purpose of challenging the juror for cause, if he sees fit.

By the COURT. What do you desire to do, Col. Johnson?

Mr. JOHNSON. Will your honor indulge us for a moment until Mr. Howard arrives?

By the COURT. Yes, sir.

By the COURT. Are you now ready, gentlemen?

By Mr. JOHNSON. We have nothing to say, your honor.

By the COURT. Mr. Clerk, call the jury.

The jury are called, and all answer to their respective names.

By the COURT. This is one case where apparently everybody is against the court. In this connection I want to say, in proceeding with this trial, that as soon as this matter was discovered by the court I at once advised counsel for both the prosecution and the defendant, in order that they might avail themselves of any rights they might have under it. I was of the opinion, and am still of the opinion, that if a challenge were properly interposed by either party and the fact properly presented that it would be ground for excusing the juror. However, such facts are not before me in a way that I could act upon, and although there are many authorities the other way, perhaps the weight of authority is the other way; the United States Supreme Court follows the rule that I have suggested.

21 10. The testimony of Alice Welsh as to impression made upon her by appearance, conduct, and conversation of defendant, found on pages 410 to 416 of the record, as follows:

ALICE WELSH being called as a witness in behalf of the defendant, after being duly sworn, testified as follows:

Q. State your name to the stenographer.
A. Alice Welsh.
Q. Do you know Tom Queenan and the other Queenans?
A. Yes, sir.
Q. How long have you known them?
A. About 17 years.
Q. Have you been at their home?
A. Yes, sir.
Q. About how frequently and to what extent the last few years?
A. I have been with them weeks, yes, months at a time for 17 years; once or twice a week, sometimes more often.
Q. What relation, if any, do you sustain to them?
A. None whatever.
Q. Did you know Tom's wife, Ella?
A. Yes.
Q. Did you observe the relations between Tom and his wife, as to whether they were affectionate or otherwise?
A. Very affectionate.
Q. Did you ever hear any disturbance between them?
A. Never.
Q. Were you acquainted with Tom's condition, as to whether he was ill or well?
A. Yes, sir.
Q. What do you know of this, Miss Welsh?
Mr. CHAMBERS. We object, and ask that the time be stated as to when he was sick or well.
Mr. HOWARD. I will cover that.
Q. Do you know as to whether or not he had any continuous affliction?
A. Yes, sir.
22 Q. Now, what do you know of his suffering from it?
A. Please explain.
Q. What do you know as to whether he suffered?
(The Territory objects, for the reason that it is asking for a condition.)
By the COURT. He is asking what she knows about it. That would give her an opportunity to explain all about it.
Mr. CHAMBERS. She can make any explanation, if I understand the court?
By the COURT. Yes; as to his appearance.
Mr. CHAMBERS. But not as to what he said with reference to his condition at all.
By the COURT. No. She can relate any explanation as to pain or suffering that he made at the time when he appeared to be suffering or claimed to be suffering, but not any statement of his as to the condition of his limb.
A. I have often seen him suffering from his lower limbs, and he has suffered from his head.

Mr. CHAMBERS. We object to that, and ask to have it withdrawn.

By the COURT. You must state what his appearance was, and what he said in relation to that.

Mr. HOWARD. I will get all I care to ask this witness in a briefer way than that.

Q. You may state whether or not frequently you have seen him when he was suffering from his leg. Answer yes or no.

(The Territory objects, as leading and suggestive. Overruled.)

A. Yes, sir.

By the COURT. I think that asks for the substance of what you are trying to prove.

Mr. HOWARD. No; I just want yes or no.

By the COURT. She has answered yes—that she did see him suffering.

Q. I will ask you whether you observed his conduct and the expressions of his countenance frequently when he was suffering, or appeared to be suffering, from his limb and head?

(The Territory objects, as leading and suggestive; the witness has not testified that she knew of his suffering from his limb or head. Sustained by the court and defendant excepts.)

23 Mr. HOWARD. I will say to the court that this is all preliminary.

Q. I will ask you whether or not you are and for some years have been familiar with his manner and conduct and expressions of countenance when he was comparatively well, or as well as he usually was? Answer by yes or no.

A. Yes, sir.

Q. Now I will ask you whether or not you are and for some years past have been familiar with his ordinary conduct and expression of countenance when he was suffering as much as he usually suffered when he was ill or suffering with pain in the head or leg?

A. Yes, sir.

Q. I will ask you, Miss Welch, if at any time during the past few months you have met him when you observed upon his countenance and in his conduct and expression that which was different from either of the expressions which I have asked you about?

(The Territory objects as incompetent and immaterial and asking for a conclusion.)

By the COURT. I think that is preliminary. That can be answered yes or no. Overruled.

A. Yes.

Q. Now, relate to the jury that circumstance, Miss Welch.

A. A few days previous to Mr. Queenan's trouble I met him on the street of Oklahoma City. I stopped to speak to him, as something struck me as unusual, extraordinarily unusual——

(Objected to.)

By the COURT. State what his condition was.

Q. Describe it as best you can, Miss Welch. State what his condition was as near as you can; what he did and how he acted and how he looked and how he appeared.

A. He looked awfully bad, terribly bad——

(Objected to.)

Mr. CHAMBERS. We would like to have the witness instructed to state just what was the character of his appearance.

By the COURT. I am not sure; let her proceed.

A. As I said, he was looking awfully bad. I stopped to talk to him; asked him how he was feeling——

By the COURT. Asked Mr. Queenan?

A. Yes, sir; Tom.

Mr. CHAMBERS. We object to the answer that he may have made.

By the COURT. When was this?

A. A few days previous to this trouble.

(Overruled. Territory excepts.)

24 Q. Proceed.

A. However, he didn't seem as usual.

By the COURT. No——

Q. State what he said and how he looked.

A. While talking with me he rested his foot; he leaned on a cane and it impressed me——

(Objected to.)

Q. What did he say?

A. I asked him why he hadn't been up to see his mother. He told me that he was not able to walk up there.

(Objected to as incompetent. Sustained, and defendant excepts.)

Q. Go ahead. State what his appearance was, as near as you can, to the jury.

A. He seemed unusual. He leaned on his cane and had a queer look, horrible look, an expression that I have never seen on his face in the 17 years I have known him, neither since nor before; an expression I have never seen on any one's face.

(The Territory objects to the last statement and asks to have it withdrawn from the jury.)

By the COURT. Confine your answer to the defendant.

Mr. HOWARD. I would like the ruling made in the record.

By the COURT. Confine your expression to the defendant and not anyone else.

Mr. HOWARD. That part as to anyone else is all right.

Mr. CHAMBERS. Not as to her own opinion.

By the COURT. No. State what his condition was, or anything he said in reference to pain or suffering.

A. He complained of his head hurting him dreadfully bad.

By the COURT. State what he said.

A. Well, his words was something like this: That he was suffering from his head; that he was also suffering from his leg and was unable to stand on it; was able only to stand on it, he said, while working.

Q. Did I understand you to say that this expression of countenance was something you had never seen on his face before?

A. Yes, sir.

Q. What effect did that expression have upon you?

(The Territory objects as incompetent and immaterial. Overruled.)

25 By the COURT. That might be asked in a different way. I think the proper answer can be given in that form, as well as any other.

Mr. CHAMBERS. As to what effect it had upon her?

By the COURT. I think he is asking for an opinion.

Mr. CHAMBERS. We object to that, for the reason a foundation has not been laid.

Mr. JOHNSON. The foundation has been laid on a 17 years' acquaintance.

Q. I will ask you whether or not in your ordinary association with him, whether sick or well, there has ever been anything in his expression or conduct that has affected you unpleasantly or impressed you with his insanity up to that time?

(The Territory objects as incompetent and immaterial and asking for an opinion of the witness. Sustained, and defendant excepts.)

Q. I wish you would tell the jury what effect his appearance and conduct, upon this particular occasion, had upon you, Miss Welch.

(The Territory objects as asking for an opinion and conclusion of the witness not based upon any statement of facts, as the witness has not shown herself competent to testify. Overruled.)

Q. Go on and state what effect it had upon your mind at that time, when you saw him?

A. It would be hard to describe the effect it had.

By the COURT. Just state briefly just what effect it did have.

Mr. CHAMBERS. Won't she be limited to the statement as to whether in her opinion he was sane or insane?

By the COURT. It goes to that question.

Mr. CHAMBERS. She may go ahead and relate a whole lot of circumstances as to impressions——

By the COURT. I will not permit her. Go ahead.

Q. What effect did it have upon your mind at that time when you saw him?

A. It had a dreadful effect.

By the COURT. You will not consider that, gentlemen.

A. And it worried me then and continued to worry me——

(Territory asks to have that answer stricken out.)

By the COURT. Sustained. Ask her the straight question.

(Defendant excepts.)

26 Mr. HOWARD. I don't want to ask her the straight question, if the court please, at this time.

Mr. CHAMBERS. We insist upon our objection, then.

By the COURT. I think it is competent if she comes within the rule, but she ought not to go outside.

Q. You may state, Miss Welch, whether, upon this matter, his conduct and appearance, and what you heard and observed and all, how it impressed you as to whether or not his mind was affected, or wrong, or whether he was insane.

(The Territory objects as incompetent and immaterial, and the proper foundation has not been laid, and the question embraces more than has been testified to before the jury. Overruled.)

A. Yes, sir, it effected me, made the impression upon me that there was something wrong with his mind.

Q. How is that?

A. It made the impression upon me that there was something wrong with his mind.

Q. Now, will you tell the jury what effect these things had upon you; how it effected you?

(Territory objects as incompetent and immaterial.)

By the COURT. She is entitled to answer that as pertaining to the condition of his mind.

Mr. CHAMBERS. She has answered that.

The COURT. I will confine it to that.

Mr. HOWARD. She has answered that, but that is not the purpose, if the court please. It is this: I may observe an individual, and if it is one whom I have never seen and for whom I have no regard, I may get a sort of an impression that his mind is not right. Another man standing by me may see the same man and, because of his relations or his feelings, the impression upon his mind may be a very different one, and his testimony may be very valuable, if he is permitted to describe the effect it had upon him.

By the COURT. It is clear that this witness is not familiar with the rule of evidence, and apparently don't know what you want to elicit from her.

Mr. AMES. It is not so much of an expression as to this witness's opinion as to whether this party whom she saw was sane or insane, as the effect his appearance had upon her, as a fact.

By the COURT. Gentlemen, upon that proposition, I will say this: I don't believe it makes any difference, so far as the defendant is concerned, the effect that it had upon her, except in so far as it enabled her to determine his sanity or insanity.

27 Mr. HOWARD. That is the point exactly that we want to show.

By the COURT. She can testify as to what his condition was, as to anything about him that induced or went to make up that conclusion, if there was anything different about him in any way, she can state just what it was. If there is any expression that was unusual, or anything that he said, or that he did, she can show that; she is entitled to detail all of these things, but, in my opinion, the effect it made upon her is embraced in that opinion. The fact that it made her feel horrible, or anything, I don't think is competent; it is her conclusion that she formed as to his sanity or insanity, that is in the nature of opinion evidence which she is just as much entitled to give as anything else.

11. The testimony of John J. Queenan as to the condition of defendant's mind and impression made upon the witness, etc., as found on pages 457 to 462 of the record, as follows:

JOHN QUEENAN recalled by defendant.

Q. Mr. Queenan, in what business has your brother been engaged, or had he been engaged prior to this tragedy, for the last year or a little more?

A. Tending bar in Oscar Reagon's saloon.

Q. Did you or not ever hear him make any declarations with reference to his business, or his feelings about his business?

A. I did.

Q. Tell the jury just as fully as you can what declarations you heard him make about his business, or his feelings in connection therewith.

Mr. CHAMBERS. That is the question or practically the proposition that was proposed when this witness left the stand the other day, only it was in

a little different shape. The proposition of counsel for defendant
28 was to prove by this witness, or to ask him as to whether he was satisfied or dissatisfied with the business or pursuit that he was then engaged in during this 12 months. Now, we withdraw our objection as to the witness stating whether or not he was acquainted with his feelings in regard to it and stating what that feeling was; but we object to the witness detailing a conversation that he had with his brother or any conversation that he had with his brother relative to that or any other subject. It is not a question as to what he said about it, but it is a question in regard to what his feelings were in regard to this business.

By the COURT. He could only ascertain what his feelings were by his expressions and declarations.

Mr. FULTON. It might possibly be that he would know it from other sources.

By the COURT. I can't conceive of any other way he could know it. This is the proposition that is presented. He has interposed as a defense that he was insane; now they are seeking to show that the business and his condition weighed upon his mind and was one of the elements which led to his insanity. That is their contention. Now, these declarations are not admissible for the purpose of showing as to whether or not he committed the act; nothing of the kind; but if admissible at all they are only for the purpose of determining as to whether or not the defendant was in his right mind, and they will be confined to that issue, as to whether or not he was insane at the time he committed the act. I think I will permit this to go in, gentlemen, under proper instructions. Wild, rambling declarations of a party might be considered by the jury, and, of course, the weight that is to be given to them would be a matter for the jury solely; but this does not fall, in my judgment, within the rule that declarations made in the interest of the defendant are not admissible. I don't think it would fall within that rule.

By Mr. TAYLOR. He may state if he can arrive at what his feelings were from the conversations, but he can not state the conversations. That is the point we make here. He would have no right to put that in evidence.

By the COURT. No; I think the rule is just the other way. I think he can show what he said and what he did, but can not give his opinion as to what his feelings were.

Mr. TAYLOR. This is not for the purpose of determining whether he is insane or sane at the time he makes these expressions or statements, but for the purpose of showing whether or not he is satisfied with the business he was engaged in.

By the COURT. That is one element.

Mr. TAYLOR. Then he can not state any conversation itself, but that he was dissatisfied with his business from these conversations; the impression that was made upon this witness with reference to that.

29 By the COURT. That would be clearly incompetent—impressions made on the other witness. I ruled that out the other evening. It is not a question of what this man's impression is, but as to whether or not he was satisfied or dissatisfied, and that is a question for the jury to determine, in my judgment, from what he said and did and his actions. Proceed, gentlemen.

Q. Tell it as fully as you can. Don't weave into it any of your own language, but state what he said.

A. He said to me, "John, I have got to quit this business that I am in." That was at this time he was tending bar. He says, "I am ashamed to meet my friends," he says; "the associations that surround the saloon there ain't what they ought to be, and I am afraid that people will look down upon me and my wife and babe," he says, "and also look down upon my father's family."

Q. Can you remember how recently before this tragedy he expressed these fears or feelings to you?

A. Oh, he expressed those feelings to me as many as five to six times at least, and up to—well, the last time I remember was within a month prior to this tragedy; less than a month.

Q. State what manifestations, if any, of feeling he made at any of these times when making these declarations to you.

(The Territory objects as incompetent. Let him state what he said.)

Mr. JOHNSON. It is suggested to me that the question in its character is leading and suggestive. But what I desire to submit to your Honor is the competency of the matter——

By the COURT. I am satisfied as to the competency of the evidence. You will confine yourself to what he said and what he did and his expressions, either of countenance or physical expression, or expressions that he may have made.

A. On one occasion that he was talking to me about this matter, in his own room at our house on 3rd street. He was sitting in his chair and there was only the two of us in there, he and I, and he was crying when he was telling it to me.

Q. I will ask you to state, Mr. Queenan, whether or not on any occasion or occasions during this time your attention was called to any manifestations of feeling or sadness on his part by his own act or by having your attention directed to his conduct by another.

(The Territory objects as incompetent, immaterial, and leading. Sustained. To which the defendant excepts.)

Q. State whether or not at any time during the late fall of the year 1899, and shortly before your brother and sister moved from your father's house, you had any conversation with Mrs. Queenan, the deceased, about your brother's mental condition, or whether she at any such time called your attention to your brother's mental condition and asked you to see it.

(The Territory objects as incompetent, immaterial, and hearsay.)

30 By the COURT. Sustained as to that part that includes the request. The other part he will be permitted to answer.

Mr. CHAMBERS. I don't understand that he will be permitted to state what Mrs. Queenan said.

By the COURT. That is the part I am excluding—as to what she told him to do.

(Defendant excepts.)

Mr. CHAMBERS. That is the entire context of the question.

By the COURT. There is only one purpose for which it is competent and that is to show whether or not this was discussed at a certain time.

Mr. HOWARD. The court will remember that when the prosecution were interrogating witnesses as to what Mrs. Queenan said in reference

to his conduct, etc., that we then stated that we had evidence of a similar character. Now, what she said, principally, is all there is of this question; it is not all but it is the most important.

By the COURT. The only feature of this that I see that is competent is that the subject was discussed. I am permitting him to answer that, but not as to what they said—not the language. I don't think that is material because it is hearsay; but the other, the fact that it was discussed, that might be material.

Mr. JOHNSON. To the court's limitation of the question the defendant excepts.

Mr. HOWARD. We will frame a new question.

The COURT. He can answer that.

Q. Was or not the mental condition of your brother, as to his mind being unsound, discussed between you and your sister, Ella Queenan?

Mr. JOHNSON. It is to be assumed, of course, the witness will understand the question. I am not asking for what she stated, but as to whether or not it was discussed.

(The Territory objects as incompetent; overruled.)

A. We did. Ella and I talked that matter over at least three different times; at least that many.

Q. Had Mrs. Queenan a business before she was married—a profession or calling?

A. She worked in a millinery store.

Q. She was a milliner, wasn't she?

A. Yes, sir.

Q. What knowledge had you, if any, as to whether or not Mrs. Queenan at times after her marriage engaged as a saleswoman or otherwise in this business as the employee of others?

A. She did.

31 Q. Do you know to what extent during the four years of her married life she was so engaged, Mr. Queenan?

A. Well, I couldn't say as to that. I would say probably ¼ of the time; that would be just guessing at it. That could be shown by the books down there, I guess.

Q. Do you know when the last time was?

A. It seems to me she quit working at her profession about two months before this tragedy; maybe a little more than that.

Q. Now, what expressions, if any, or objections to her so engaging in her business did you ever hear your brother make?

(The Territory objects as incompetent, irrelevant, immaterial, and hearsay. Overruled.)

By the COURT. That is the defendant himself.

A. He said that he didn't want her to work for anyone. He thought, he says, I think that is a husband's place to make the living and insisted on her not——

(Objected to.)

Q. Just state what he said.

A. He said, "No, don't do it," or words to that effect; "don't you go to work for those people." Once for Mrs. Wiley, I believe, he says, "I don't want you to work for anyone." He says, "I think that is the husband's place; to make the living," and Ella asked me about it.

By the COURT. Don't state what she said.

A. And many times, even after she went to work, he asked her to quit.

(The Territory objects as incompetent.)

Mr. JOHNSON. That is all within the question.

By the COURT. Let him state what he said.

Q. Can you recollect the language he used?

A. Nearly, I guess. In substance, he said to her, different times: "Ella, I wish you would quit working down there; it bothers me, and people will be talking about me as no good, and indolent, and things of that kind."

Q. Do you know from observation what the relations between your brother and his wife were as to their being affectionate or otherwise?

(Objected to as a repetition.)

Mr. JOHNSON. It is preliminary.

A. I do.

Q. What were those relations?

(Objected to for the same reason. Overruled.)

A. They were always affectionate, both of them; very much so.

32 Q. Now, do you know from any declarations of Ella Queenan, made to you or in your presence, as to what relations existed between her and her husband as to being affectionate or otherwise?

(The Territory objects as incompetent, immaterial, and hearsay. Sustained, and defendant excepts.)

Q. Did you, or not, ever hear your sister-in-law, Mrs. Queenan, make any declarations as to the relations between her and her husband?

(The Territory objects as incompetent, immaterial, and asking for hearsay testimony. Sustained, and defendant excepts.)

Q. How long prior to this tragedy did you last see your brother?

A. I saw him twice within 7 or 8 days prior to this tragedy. One time at his room and the other time at the saloon, Mr. Reagon's saloon.

33 12. The testimony of John H. Beaty, a witness for the defendant, as appears in the record on pages 476 to 479, as follows:

JOHN H. BEATY, being called and sworn, testified in behalf of the defendant as follows:

Q. Judge, where do you live?

A. In this city.

Q. How long have you been here, Judge?

A. Since the country was opened—about September, 1899.

Q. What is your profession?

A. Practicing law.

Q. Are you acquainted with Tom Queenan?

A. Yes, sir.

Q. How long have you known Tom, Judge?

A. A number of years. I disremember how long, but from soon after I came here.

Q. How intimately have you known him?

A. Quite well. I had him do my barber work for some years.

Q. What do you say; are you acquainted with his disposition as to kindliness and affection and amiability or otherwise?

A. I used to be; yes, sir.
Q. Well, sir, what do you say that disposition was and is?
A. I never saw anything developed in him of an ugly disposition at all.
Mr. MITCHELL. Answer the question.
Q. State what you saw about his disposition.
A. I thought he was of a very kindly disposition.
Q. You say you never saw anything to the contrary?
A. I never did. Never saw nor heard of him having a difficulty with a person that I remember of.
Q. Do you remember the fact of the tragedy, the killing of his wife?
A. Yes, sir.
Q. Do you remember on the day prior to that you saw him?
A. Yes, sir; I saw him.
Q. At about what time in the day, Judge?
A. It was in the evening about supper time; about the time I started to supper.
34 Q. Where did you see him?
A. In Oscar Reagon's place on Broadway.
Q. I will ask you whether or not at that time any conduct or manner or appearance of his attracted your attention?
A. Not at that time, particularly.
Q. Well, what conduct or action or look on his part did you observe, if any, at that time, different from usual?
A. I observed him sitting on a desk sideways, with one foot up in the window, on the window sill, looking out at the window.
Q. Which end of the room?
A. East end of the room, and when I walked in the house he was sitting in a position with his side to me, as I passed in.
Q. Do you now remember anyone that was in company with you?
A. There was some man, but I disremember now who it was. It appears to me that it was Mr. Compton.
Q. C. A. Compton?
A. Yes, sir.
Q. You have been able, have you, to settle in your mind who it was to a certainty?
A. I have; yes, sir.
Q. Now, so that the jury may know, Judge, tell where that desk on which he was sitting was, in that room.
A. The desk is sitting behind the railing. There is a railing at the east end of the room similar to that railing, but not so long.
Q. Reaches from east end of the room back to what?
A. It extended from east wall, probably 4 to 6 feet west, to where there was a mirror, or something similar to a mirror, standing there.
Q. To the end of the bar, Judge?
A. Yes, sir; at the east end of the bar. There is a gate through that railing, and the desk sits behind the railing in the corner of the building.
Q. Against the window?
A. Yes, sir; at the window, and there is a chair there usually.
Q. Now, tell the jury, as near as you can, how he was sitting when you went in.

A. He was sitting on the side of the desk, with one foot upon the window sill, and looking out at the window.

Q. Tell the jury what occurred.

A. We stepped back behind the glass or mirror, I and Mr. Compton, or the other party, and we may have struck the counter with some money, and I think I called myself and used the language, "Where is the grocery keeper?" He walked around and waited on us.

35 Q. What did he seem to be doing when you went into the room, if anything?

A. He was sitting looking out of the window.

Q. Did you at that time, or when he came back to the bar, after having his attention attracted, notice any difference from his usual appearance or demeanor?

A. I did not, at that time.

Q. Have you not since that time recalled the fact that such did exist?

A. I don't understand what condition you mean, Col.

Q. I mean as to his manner or appearance or abstraction or otherwise.

A. Well, I did after this trouble occurred. I thought possibly——

By the COURT. Don't state any opinion that you formed since that time as to what his condition was. You may state any condition that existed then or any impression that it made upon your mind as to his condition.

Q. Since this occurrence of which you speak, have you recalled his manner and appearance at that time, and has that manner and appearance created an impression or opinion on your mind as to his mental condition at that time?

(The Territory objects as incompetent.)

By the COURT. That question is competent for one purpose, if you wish to present that in this case at this time. We have a special statute that gives them the right to raise that question now, if they want to raise it. Are you asking now as to his opinion at this time?

Mr. HOWARD. His opinion at this time as to what his condition was then.

By the COURT. I think that is incompetent for the purpose of this trial.

Mr. JOHNSON. We except.

36 13. The instructions given by the court to the jury, being numbered from 1 to 16 inclusive, and being found at pages 650 to 657 of the record, and being as follows:

TERRITORY OF OKLAHOMA, *Oklahoma County, ss:*

In the district court of the third judicial district of the Territory of Oklahoma, sitting in and for Oklahoma County.

THE TERRITORY OF OKLAHOMA,
vs.
THOMAS P. QUEENAN. } No. 832.

Instructions to jury.

Gentlemen of the jury, the court instructs you as follows:

1. This is a prosecution, by indictment, by the Territory of Oklahoma against Thomas P. Queenan, in which it is charged that the said defend-

ant, on or about the 27th day of January, in the year of our Lord one thou-sand nine hundred, in the county of Oklahoma and Territory of Oklahoma, then and there wilfully, unlawfully, feloniously, and with a premeditated design to effect the death of Ella Queenan, his wife, her, the said Ella Queenan, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of Oklahoma. To this charge the defendant has entered the plea of not guilty, and the issue for you to determine from the evidence, under the instructions of the court, is the guilt or innocence of the defendant.

Given and excepted to by the defendant.

B. F. BURWELL, *Judge.*

2. In this case the law raises no presumption against the defendant, but he is presumed to be innocent of the crime of which he stands charged until his guilt is proven by competent evidence beyond a reasonable doubt; and it is incumbent upon the Territory to establish, by competent evidence, beyond a reasonable doubt, every material allegation of the indictment as therein charged.

37 3. A reasonable doubt is that state of the case which, after a full, fair, and impartial consideration of all of the evidence, leaves the minds of the jurors in that condition that they can not say that they feel an abiding conviction, to a moral certainty, of the truth of the charge; that is, to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

4. Homicide is the killing of one human being by another. Homicide is either murder, manslaughter, excusable homicide, or justifiable homicide.

Homicide is murder in the following case: When perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being.

5. Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong and to comprehend and understand the consequences of his act is excusable for any act in reference to which his mind is in such weakened condition. But it is not every derangement of the mind that will excuse one from the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequences of such act, the law recognizes him as sane and holds him responsible for such acts; and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take he r life and was able to comprehend and understood the consequences of such act, then and in that event it will be your duty to find the defendant guilty of murder, as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty.

Given and excepted to by defendant.

B. F. BURWELL, *Judge.*

6. You are further instructed that the law presumes the defendant to be sane, or of sound mind, until sufficient evidence is introduced to raise in the minds of the jurors a reasonable doubt of that fact; and if you should find that the defendant has introduced sufficient evidence to raise a reasonable doubt in your minds of his sanity, then and in that event it is incumbent upon the Territory to overcome that doubt by competent evidence and to establish the sanity of the defendant beyond a reasonable doubt; but in determining the sanity or insanity of the defendant you are to determine as to whether he was sane or insane, as defined by these instructions, at the time of the homicide.

7. You are instructed that the Territory is not bound to prove a motive on the part of the defendant for taking the life of the deceased, but if, from the evidence, you should fail to find a motive on the part of the defendant for taking the life of his wife, this is a circumstance which may be considered in his favor; but it does not necessarily follow that no motive existed in the mind of the defendant for such act simply because the Territory may have failed to prove a specific motive. A design to effect death is inferred from the fact of the killing,
38 unless the circumstances raise a reasonable doubt whether such design existed; and a design to effect death, sufficient to constitute murder, may be formed instantly before committing the act by which it is carried into execution, and homicide committed with a design to effect death is not the less murder because the perpetrator may have been in a state of anger or voluntary intoxication at the time.

Given and excepted to by the defendant.

B. F. BURWELL, *Judge.*

8. The only defense the defendant has interposed is that he was insane at the time he committed the act which the Territory contend resulted in the death of the deceased, and if you find from the evidence that the defendant took the life of Ella Queenan, as charged in the indictment, then and in that event you should find him guilty of murder, unless you entertain a reasonable doubt of the defendant's sanity at the time of the homicide. But if the defendant was unconscious of the nature of his act which resulted in the death of the deceased, if you find beyond a reasonable doubt that he committed the act which resulted in her death, or that he did not know that such act was wrong, or that he was not able to comprehend or understand the consequences of such act, in the law he is treated as insane and should be acquitted, for one who is insane, as measured by the rule laid down in these instructions, is incapable of committing crime. But in determining the guilt or innocence of the defendant, in which is included the issue of the condition of the defendant's mind at the time of the homicide, in connection with the other evidence you should take into consideration any admissions which may have been made by the defendant against his interest, just after the homicide, if you find any such were made, and also his acts and conversations just prior to and just subsequent to the homicide, if such were had, as tending to show the condition of the defendant's mind at the time of the homicide and as tending to prove the guilt or innocence of the defendant.

Given and excepted to by the defendant.

B. F. BURWELL, *Judge.*

9. You are further instructed that expert testimony as to the sanity or insanity of a person, under a given state of facts, is legal and competent evidence and is now recognized by all of the courts, but this evidence should be measured and weighed the same as any other evidence, under the same rules; and in determining the weight that is to be given to the testimony of any expert witness you should take into consideration his experience, his education, his knowledge of the disease of insanity, his appearance upon the stand, his manner of testifying, and from all of the circumstances surrounding his testimony, and his experience and education, determine the weight that the testimony of any such witness or witnesses is entitled to and give credit accordingly; but as to the weight of such testimony you are the sole judges.

Given and excepted to by defendant.

B. F. BURWELL, *Judge.*

39 10. You are further instructed that one who is not a physician or an expert, but engaged in the ordinary avocations of life, in law are permitted to testify as to his opinion as to whether or not a party is sane or insane, in this case evidence of this character has been introduced by both the Territory and defendant, and in considering this testimony you will take into consideration the associations of the respective witnesses with the defendant, their opportunities and ability to observe the facts about which they testified, their intelligence or lack of intelligence, their opportunities for observing the defendant, and from all of the circumstances surrounding their testimony in this case determine the weight that is to be given to the testimony of any such witness or witnesses, and to give credit accordingly.

11. You are further instructed that the testimony of experts, or the testimony of thoose who are not experts, as to the condition of the defendant's mind as to sanity or insanity at the time of the homicide, is merely an opinion of the witness, either upon a hypothetical case put to the expert or upon the personal observations of those who are not experts, and, as stated before, you are the sole judges, and you alone are to determine the weight and creditability of such evidence.

Given and excepted to by defendant.

B. F. BURWELL, *Judge.*

12. While the jury must be convinced of the guilt of the defendant beyond a reasonable doubt, from the evidence, in order to warrant a conviction, still the proof need not be the direct evidence of persons who saw the offense committed. The acts constituting the crime may be proved by circumstances.

By circumstantial evidence in criminal cases is meant the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged, and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant, beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty; but where a conviction for a criminal offense is sought upon circumstantial evidence alone, the Territory must not only show, by competent evidence, that the alleged facts and circumstances are true,

but they must be such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the defendant's guilt.

Given and excepted to by defendant.

B. F. BURWELL, *Judge.*

40 13. The creditability of the witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of evidence as evenly balanced. The jury have a right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, their interest or lack of interest in the result of the trial, and from all the other surrounding circumstances appearing upon the trial, determine which witnesses are more worthy of credit and to give credit accordingly.

Given and excepted to by defendant.

B. F. BURWELL, *Judge.*

14. In this case, if you find the defendant guilty of murder, then it becomes your duty to determine as to whether or not he shall be punished by death or confinement in the penitentiary for life at hard labor.

15. You will consider these instructions altogether. You have no right to consider any part or parts of them to the exclusion of other portions thereof.

You must be unanimous in your conclusions. Unless you all agree no verdict can be found. Forms of verdict will be handed you by the court.

Given this the 15th day of March, 1900.

B. F. BURWELL, *Judge.*

16. Gentlemen, you have listened long and patiently to the arguments of counsel. For two days and a portion of two nights you have listened to the theories advanced by the respective counsel and to their comments upon the evidence. Some things may have been said which might incite your feelings for or resentment against the defendant, and other statements which might create in your minds an undue feeling for or prejudice against the counsel for the Territory or the defendant; and in this connection the court instructs you that it is your duty to give careful, candid, and honest consideration to any and all theories advanced by counsel which are reasonably deducible from the evidence introduced upon the trial; but you will not permit your verdict to be influenced by the effect which a verdict of guilty or a verdict of not guilty may have upon the friends of the defendant or upon the friends of the deceased. Your verdict should not be the result of passion or prejudice, but should be the result of a candid, fearless, careful, honest consideration of all of the evidence introduced upon the trial, under the instructions of the court, and to the best of your ability determine the guilt or innocence of the defendant. You will consider this instruction together with the other instructions.

Given and excepted to by the defendant.

B. F. BURWELL, *Judge.*

41 14. The instructions offered by the defendant, and being numbered from 1 to 6, and found on pages 658 to 661 of the record, and being as follows:

Instructions requested by defendant.

1. If you entertain from all the evidence a reasonable doubt as to whether or not at the time the defendant shot and killed Ella Queenan—if from the evidence you believe, beyond a reasonable doubt, that he did shoot and kill Ella Queenan—his mind was so affected by insanity as to render him unconscious of the act of shooting, you should acquit him.

Refused in the above form. Given in substance, deft. excepts.

B. F. BURWELL, *Judge.*

2. If from consideration of all the evidence you entertain a reasonable doubt as to whether or not the defendant, at the time he shot and killed Ella Queenan—if you believe from the evidence, beyond a reasonable doubt, that he did shoot and kill her—was so affected by insanity that he did said killing under an impulse which he could not control or restrain, you should acquit him.

Refused. Deft. excepts.

B. F. BURWELL, *Judge.*

3. If from a consideration of all the evidence you entertain a reasonable doubt as to whether or not the mind of the defendant at the time he shot and killed Ella Queenan—if you believe from the evidence, beyond a reasonable doubt, that he did shoot and kill Ella Queenan—was so affected by insanity as to render him unable to distinguish between right and wrong, or to know that his act was wrong, you should acquit him.

Given in substance. Deft. excepts.

B. F. BURWELL, *Judge.*

4. You are further instructed that you are the sole judges of the evidence in this case, and of the witnesses who have testified; and in considering the case it is your duty to take into consideration all the evidence produced before you, and to give to such evidence such weight as in your judgment it is entitled to. And in determining the weight which you shall give to the testimony of any and all witnesses who have testified, it is your duty to consider their interest, if any, their bias or prejudice, if any appear; their opportunity to observe and know the facts to which they have testified; their means of knowledge touching the matters about which they testify; and after considering, give to the testimony of each and all the witnesses only such weight, and only such weight, as in your judgment it is entitled to.

Given.

B. F. BURWELL, *Judge.*

42 4½. A person partially deprived of reason is incapable of committing crime if, at the time of committing the wrongful act, he is incapable of knowing its wrongfulness, and the jury can not return a verdict of guilty in this case unless they believe from the evidence and to the exclusion of every reasonable doubt that at the time the act was

committed the defendant was so fully possessed of his reason as to know the wrongfulness of his conduct.

Given in substance. Deft. excepts.

B. F. BURWELL, *Judge.*

4¾. The burden of the proof rests upon the Territory to prove beyond every reasonable doubt every material allegation of the indictment, including the sanity of the defendant at the time of the commission of the offense, though in the absence of all evidence on the subject the defendant is presumed to be sane, but if the evidence creates in the minds of the jury a reasonable doubt of the sanity of the defendant at the time of the offense charged, they should return a verdict of not guilty.

Given in substance. Deft. excepts.

B. F. BURWELL, *Judge.*

4¼. Every man is presumed to be sane, and in the absence of testimony engendering a reasonable doubt of sanity no evidence on the subject need be offered; but whenever the question of sanity is raised and put in issue by such facts, proven on either side, as engenders such doubt, it devolves upon the State to remove it and to establish the sanity of the prisoner to the satisfaction of the jury beyond all reasonable doubt arising out of all the evidence in the case.

Given in substance. Deft. excepts.

B. F. BURWELL, *Judge.*

5. You are instructed that in either of the following cases it is your duty to acquit the defendant:

1. If at the time of the commission of the act he was a lunatic.

2. If at that time he was an insane person.

3. If at the time he was of unsound mind or temporarily or partially deprived of his reason and was incapable of knowing the wrongfulness of the act charged against him.

And it is not necessary that either of these conditions shall appear beyond a reasonable doubt or by a preponderance of the evidence, but if you entertain from the evidence a reasonable doubt as to his sanity or lunacy, or a reasonable doubt as to his soundness of mind and knowledge of the wrongfulness of the act, as above specified in this instruction, you should acquit him.

Given in a different form. Deft. excepts.

Attorneys for defendant.

B. F. BURWELL, *Judge.*
J. W. JOHNSON ET AL.,
Attorneys for Defendant.

43 6. You are instructed that while persons other than physicians or those specially learned on the subject may give their opinions as to the sanity or insanity of the defendant, yet when such opinions are to the effect that the defendant was sane, you should take such opinions as mere negative testimony and give it only such weight as it may be entitled to in connection with the other evidence in the case, and particularly in view of the testimony of the physicians to the effect that those afflicted with melancholia often conceal or are careful not to reveal their affection,

and that it is sometimes necessary for a physician to watch the patient for a long period of time before being able to discover the evidence of insanity.

H. H. HOWARD ET AL.,
Attys. for Defendant.

3/15/1900.
Requested by defendant and refused. Deft. excepts.

B. F. BURWELL, *Judge.*

(Endorsed:) 832. Territory vs. T. P. Queenan. Instructions of defendant. Refused. Filed Mch. 17th, 1900. B. D. Shear, clerk.

44 15. The exceptions to the instructions given, found on page 662 of the record, and being as follows:

In the district court, third judicial district, Territory of Oklahoma, Oklahoma County.

TERRITORY OF OKLAHOMA
vs.
T. P. QUEENAN. } Indictment for murder.

Defendant has excepted and does hereby except to instructions numbered one (1), five (5), seven (7), eight (8), nine (9), eleven (11), twelve (12), and thirteen (13) as given by the court herein.

J. W. JOHNSON, HOWARD & AMES,
Attorneys for Defendant.

(Endorsed:) 832. In the district court. Territory of Oklahoma vs. Thomas P. Queenan. Exceptions to instructions. Filed in district court, Oklahoma County, O. T., March 16th, 1900, B. D. Shear, clerk, by M. McKinley, deputy.

45 16. The verdict, appearing on page 664 of the record, and being as follows:

In the district court of the third judicial district of the Territory of Oklahoma, in and for Oklahoma County.

THE TERRITORY OF OKLAHOMA, PLAINTIFF,
vs.
THOMAS P. QUEENAN, DEFENDANT. } Verdict.

We, the jury empanelled and sworn in the above-entitled case, do, on our oaths, find the defendant, Thomas P. Queenan, guilty of the crime of murder, as charged in the indictment, and fix his punishment at death.

EDGAR C. OLMSTED,
Foreman.

46 17. The motion for a new trial, as appears from the record, pages 666 to 668, which is as follows:

TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

In the district court in and for said county.

TERRITORY OF OKLAHOMA, PLAINTIFF,
vs.
THOMAS P. QUEENAN, DEFENDANT. } Motion for a new trial.

Comes the defendant in said cause by his attorneys, and moves the court to grant him a new trial in said cause, and assigns the following reasons in support of said motion:

1. The court erred in admitting incompetent and immaterial testimony over the objection of the defendant, to which at the time the defendant excepted.

2. The court erred in excluding competent and relevant testimony offered by the defendant, to which action of the court the defendant at the time excepted.

3. The court erred in giving instructions numbered one (1), five (5), seven (7), eight (8), nine (9), eleven (11), twelve (12), thirteen (13), and sixteen (16), and in failing in the instructions given to fully state the ingredients of the offense and to describe to the jury the proof required on the part of the Territory, to which action of the court the defendant at the time excepted.

4. The court erred in failing to describe malice as an essential ingredient of the offense charged, and in failing to make any mention of malice in the instruction given to the jury, to which action of the court the defendant at the time excepted.

5. The court erred in refusing instructions one (1), two (2), three (3), four and one-quarter (4¼), four and one-half (4½), four and three-quarters (4¾), five (5), and six (6), in the form and substance requested by the defendant, to which action of the court the defendant at the time excepted.

47 6. Because of misconduct of the jury during the trial of said cause, consisting in their attending public religious services in said county, at the Baptist Church in Oklahoma City on the evening of March 11th, 1900.

7. Because of misconduct of counsel for prosecution in said cause, consisting in argument to the jury; 1, in alluding to the failure of the defendant to testify in said cause; 2, in misreciting and misconstruing evidence in said cause; 3, in appeals to the passion and prejudice of the jury.

8. Because the prosecution in said cause was conducted by Messrs. M. Fulton and T. G. Chambers, who are private attorneys, and who are not sworn by the court or any competent authority as assistants of the prosecution or to discharge in a proper manner the duties imposed upon the office of prosecuting attorneys, said fact constituting a violation of the fifth and fourteenth amendments of the Constitution of the United States, which guarantees to every person that he will not be deprived of his life, liberty, or property except by due process of law.

9. Because the persons sitting as jurors and by whom the verdict of guilty was rendered in said cause did not compose a jury, in that one of the persons, to wit, J. F. Harper, was not qualified to sit as a juror under the law because of his having been convicted of a felony punishable by imprisonment in the penitentiary, said conviction having occurred in Pawnee County, Nebraska, in 1881, which totally disqualified him from sitting as a juror in said cause, thereby leaving only eleven qualified persons in the jury box, and because said verdict so returned was not returned by a jury, and was in conflict with article three, section two, clause three of the Constitution of the United States, and in conflict with the sixth amendment of said Constitution, both of which provide that the trial of all crimes shall be by jury, meaning by twelve persons qualified under the law.

10. Because the verdict was contrary to law and not supported by the evidence.

11. Because the special venires in said cause were never properly issued, served, or returned, and because ten of the persons selected as jurors in said cause were never summmoned as jurors according to law.

12. Because the court erred in overruling the defendant's motion to quash and set aside the indictment in said cause, duly excepted to at the time.

13. Because the court erred in overruling the defendant's demurrer to the indictment in said cause, duly excepted to at the time. Therefore the defendant prays the court to grant him a new trial.

THOMAS P. QUEENAN, *Defendant*,
By J. W. JOHNSON,
HOWARD & AMES,
His Attorneys.

48 18. The record of the conviction of the juror J. F. Harper of the crime of grand larceny, used in connection with the motion for a new trial, found at pages 669 to 673 of the record, and being as follows:

Pleas before the Hon. A. J. Weaver, judge of the first judicial district of the State of Nebraska, at the September, A. D. 1881, term thereof, begun and held at the court-house in Pawnee City, within the county of Pawnee, September 21st, A. D. 1881. And among others the following proceedings were had, to wit:

THE STATE OF NEBRASKA
vs.
JESSE HARPER.
} Indictment for grand larceny.

THE STATE OF NEBRASKA, *Pawnee County, ss:*

Of the September term of the district court of the first judicial district of the State of Nebraska, held in and for Pawnee County, in the year of our Lord one thousand eight hundred and eighty-one.

The grand jurors duly chosen, selected, empanelled, and sworn in and for Pawnee County aforesaid in the name and by the authority of the State of Nebraska aforesaid on their oaths present:

That Jesse Harper, late of Pawnee County, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and eighty-

one, in the county of Pawnee and State of Nebraska aforesaid, unlawfully and feloniously did steal, take, and carry away certain money of the amount and value of sixty-six dollars, of the property of Charles Carver, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Nebraska.

WM. H. MORRIS,
District Attorney.

49 THE STATE OF NEBRASKA *vs.* JESSE HARPER. } Journal entries.

And now, September 21st, 1881, came the grand jurors heretofore duly chosen, empanelled and sworn and charged, in charge of an officer into open court, and being called in open court, all of said grand jurors answered to their names and presented by their foreman in open court to the court as a true bill an indictment by the State of Nebraska against Jesse Harper, charging him with grand larceny.

And now on the same day the defendant, Jesse Harper, in his own proper person is brought to the bar of the court, and thereupon John Whaley was appointed counsel for defendant by the court, and further coming on to be heard on the indictment, the prisoner is arraigned and pleads not guilty, and by his counsel announced himself ready for trial upon the issues joined herein, and thereupon came a jury consisting of the following persons: J. R. Wiley, J. L. Smith, Jacob Rist, John Richardson, Robert Cameron, John Williamson, Wm. Retchless, A. C. York, W. R. Smith, W. L. Scott, E. C. Scarborough, & Samuel Pyle, twelve good and lawful men, electors and having the qualifications of jurors, who were duly tried, examined, chosen, impanelled, and sworn as prescribed by law, and the jury, after hearing all the evidence, as well on the part of the prisoner as on the part of the State, and the arguments of counsel as well for the defense as for the prosecution, and the charge of the court, retired in charge of a bailiff duly and specially sworn as prescribed by law in that behalf to consider of their verdict.

THE STATE OF NEBRASKA *vs.* JESSE HARPER. }

And now, September 21st, 1881, came the jury heretofore sworn as aforesaid in this cause, in charge of a sworn bailiff, and the defendant, Jesse Harper, being present in open court, and by counsel, the jury being called by the clerk of the court, and each juror for himself answering to his name, returned into open court the following verdict, to wit:

We, the jury empanelled and sworn in the above-entitled case, find the defendant, Jesse Harper, guilty as he stands charged in the indictment, and we find the value of the property stolen to be sixty-six dollars.

JOHN WILLIAMSON, *Foreman.*

50 And the defendant, Jesse Harper, being in open court and having been informed of the verdict of the jury and the crime of which he had been found guilty, and having been first asked if he had

anything to say why judgment should not be pronounced against him, and having nothing further to say and no further plea to interpose, thereupon the court pronounced the following sentence and judgment, to wit:

The sentence and judgment of the court is, and it is considered and adjudged by the court, that you, Jesse Harper, be confined in the penitentiary of the State of Nebraska, at hard labor, for and during the period of fifteen months without solitary confinement, Sundays excepted, and that you pay the costs of this prosecution.

And now, on this 22nd day of September, A. D. 1881, a mittimus was duly issued to carry into effect the judgment of the court, and the same was delivered to the sheriff of Pawnee County. And afterwards the said mittimus was returned endorsed as follows:

LINCOLN, NEB., *September 26, 1881.*

Received from B. H. Fuller, sheriff of Pawnee County, Nebraska, the body of Jesse Harper, who was tried, convicted, and sentenced at the September, 1881, term of the district court of said county, holden at Pawnee City.

C. J. NOBES,
Warden of the Penitentiary.

Certificate.

STATE OF NEBRASKA,
County of Pawnee, ss:

I, J. B. Brooks, clerk of the district court in and for said county and State, do hereby certify that the foregoing is a true, correct, full, and complete transcript of the indictment, plea of defendant, verdict of the jury, and sentence of the court in case No. , entitled State of Nebraska, plaintiff, vs. Jesse Harper, defendant, as the same appears of record and on file in my office.

Witness my hand and the seal of said court this 20th day of March, 1900.

[SEAL.]

J. B. BROOKS,
Clerk District Court.

Filed Apr. 4, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSE PARDOE,
Deputy.

51 STATE OF NEBRASKA,
County of Pawnee, ss:

I, Chas. B. Letton, judge of the district court in and for Pawnee County, State of Nebraska, being a county in the 1st judicial district of said State, do hereby certify that J. B. Brooks, by whom the above attestation was made, was at the date thereof clerk of said court and duly qualified, and that the same is in due form of law and made by the proper officer.

Dated this 21st day of March, 1900.

CHAS. B. LETTON,
Judge District Court.

STATE OF NEBRASKA,
County of Pawnee, ss:

I, J. B. Brooks, clerk of the district court in and for said county and State, do hereby certify that the Honorable Chas. B. Letton, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof presiding judge of said court, duly commissioned, sworn, and acting.

Witness my hand and seal of said court this 23rd day of March, 1900.

[SEAL.] J. B. BROOKS,
Clerk District Court.

(Endorsed:) In district court of Pawnee County, Nebraska, State of Nebraska vs. Jesse Harper. Transcript.

52 19. Affidavit of Juror J. F. Harper as to his conviction of grand larceny, as found on page 674 of the record, and being as follows:

TERRITORY OF OKLAHOMA
Oklahoma County, ss:

J. F. Harper, of lawful age, being duly sworn, says on his oath that he was one of the jurors empanelled and sworn in the case of the Territory of Oklahoma vs. T. P. Queenan, in the district court of said county and Territory, and that he sat, served, and acted as a juror in said cause, the same being an indictment for murder in case numbered 832 in said court.

He says further that he is the identical person who was indicted, tried, and convicted of grand larceny in the district court of Pawnee County, State of Nebraska, at the September term, 1881, under the name of Jesse Harper, the verdict against him being returned September 21st, 1881.

He says further that he has examined the transcript of the proceeding in said cause as certified on March 20th, 1900, by J. B. Brooks, clerk of the district court of Pawnee County, Nebraska, and is the defendant named in said transcript.

J. F. HARPER.

Subscribed in my presence and sworn to before me this 7th day of May, 1900.

[SEAL.] W. C. ALLEN,
Notary Public.

My commission expires 4/22/1902.

53 20. Affidavits used on motion for a new trial, found on pages 675 and 676 of the record, as follows:

TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

In the district court in and for said county.

THE TERRITORY OF OKLAHOMA
vs.
THOMAS P. QUEENAN. } Affidavit on motion for new trial.

Personally appeared before the undersigned authority, in and for said county, J. W. Johnson, H. H. Howard, and C. B. Ames, who, upon oath,

say that they were and are the attorneys for the defendant in the above-mentioned cause, and that they conducted the defense of said cause in the trial heretofore had. They further severally say that they accepted the statement of the juror J. F. Harper on his voir dire that he was not a convict of felony, and that they had no information whatever justifying a suspicion that this answer was incorrect until Monday, the 12th day of March, 1900, when they were privately informed by the judge of this court that said Harper stated that such was the fact; and that afterward, on said day, Mr. T. G. Chambers, an attorney at law, employed by private persons in the prosecution of said cause, read a notice in court, the jury being absent at the time said notice was read, to the effect that the prosecution desired to notify the defense that the said juror was a convict of felony.

Affiant further says that said information was imparted and said notice read after the evidence for the prosecution had been closed and the defense had commenced the introduction of its evidence.

Witness our hands this 12th day of February, 1901.

J. W. JOHNSON.
H. H. HOWARD.
C. B. AMES.

Sworn to and subscribed before me this 12th day of February, 1901.

[SEAL.] B. D. SHEAR, *Clerk.*

(Endorsed:) 832. Territory vs. Queenan. Affidavit of Johnson, Howard, Ames. Filed Feb. 12th, 1901. B. D. Shear, clerk.

54 TERRITORY OF OKLAHOMA,
Oklahoma County, ss:

In the district court in and for said county.

TERRITORY OF OKLAHOMA
vs.
THOMAS P. QUEENAN. } Affidavit of defendant on motion for new trial.

Personally appeared before the undersigned authority the within-named Thomas P. Queenan, the defendant in said cause, who, upon his oath, says that he had no information tending to show that J. F. Harper, one of the jurors in said cause, was convicted of felony until Monday, the 12th day of March, 1900, and that at said time the jury had been impaneled, the evidence for the prosecution had been introduced, and that some evidence for the defense had been offered.

Witness my hand this 12 day of Feb., 1900.

T. P. QUEENAN.

Sworn to and subscribed before me this 12th day of Feb., 1901.

[SEAL.] B. D. SHEAR, *Clerk.*

(Endorsed:) 832. Territory vs. Queenan. Affidavit of defendant. Filed Feb. 12th, 1901. B. D. Shear, clerk.

55 21. Proceedings on motion for a new trial, as shown on page 677, and being as follows:

In the district court of the third judicial district, in and for Oklahoma County, Territory of Oklahoma.

Be it remembered that on the 12th day of February, 1901, the same being one of the judicial days of the regular February, 1901, term of the district court in and for said county and Territory, there were present the Honorable B. F. Burwell, judge; Mike O'Brien, sheriff; W. R. Taylor, county attorney, and B. D. Shear, clerk. Public proclamation of the opening of said court having been made pursuant to order, the following among other proceedings were had:

TERRITORY OF OKLAHOMA
vs.
T. P. QUEENAN. } 832.

This matter coming before the court on the motion of defendant for a new trial herein, said defendant is present in court and represented by his counsel, J. W. Johnson and Howard & Ames, the Territory being present by W. R. Taylor, county attorney, and T. G. Chambers, of counsel, and now due argument of said motion is made by counsel.

In the district court of the third judicial district, in and for Oklahoma County, Territory of Oklahoma.

Be it remembered that on the 13th day of February, 1901, the same being one of the judicial days of the regular February, 1901, term of the district court in and for said county and Territory, there were present the Honorable B. F. Burwell, judge; Mike O'Brien, sheriff; W. R. Taylor, county attorney, and B. D. Shear, clerk. Public proclamation of the opening of said court having been made pursuant to order, the following among other proceedings were had:

56 TERRITORY OF OKLAHOMA
vs.
T. P. QUEENAN. } 832.

The defendant being personally present in court and represented by his counsel, further argument of defendant's motion for a new trial is had, and now said matter is duly submitted to the court.

In the district court of the third judicial district, in and for Oklakoma County, Territory of Oklakoma.

Be it remembered that on the 15th day of February, 1901, the same being one of the judicial days of the regular February, 1901, term of the district court in and for said county and Territory, there were present the Honorable B. F. Burwell, judge; Mike O'Brien, sheriff; W. R. Taylor, county attorney, and B. D. Shear, clerk. Public proclamation of the

opening of said court having been made pursuant to order, the following among other proceedings were had:

TERRITORY OF OKLAHOMA
vs.
T. P. QUEENAN. } 832.

The defendant being present in court in person and represented by counsel and the Territory being represented by W. R. Taylor, county attorney, and T. G. Chambers, of counsel, the motion of the said defendant for a new trial herein coming again before the court and the court being fully advised, it is ordered that said motion for a new trial herein be, and the same is hereby, denied and overruled, to which order and ruling the defendant at the time excepted and still excepts; ordered further, that February 20th, 1901, be, and the same is hereby, designated as the day on which judgment and sentence will be passed upon said defendant.

57 22. Judgment and sentence, shown on pages 683 to 687 of the record, as follows:

In the district court of the third judicial district of the Territory of Oklahoma, in and for Oklahoma County.

THE TERRITORY OF OKLAHOMA, PLAINTIFF,
vs.
THOMAS P. QUEENAN, DEFENDANT. } Verdict.

We, the jury empanelled and sworn in the above-entitled case, do on our oaths find the defendant, Thomas P. Queenan, guilty of the crime of murder, as charged in the indictment, and fix his punishment at death.

EDGAR C. OLMSTED, *Foreman.*

(Endorsed:) No. 832. Territory of Oklahoma, plaintiff, vs. Thomas P. Queenan, defendant. Verdict. Filed this 16th day of March, 1900. B. D. Shear, clerk, by M. McKinley, deputy.

And which said verdict was then and there ordered by the court to be received, accepted, filed, and recorded; all of which was then and there, on the 16th day of March, 1900, duly and legally done.

Wherefore it is considered by the court that the defendant is adjudged to be guilty of the crime of murder, as found by the jury, and that his punishment be fixed, as assessed, at death, as determined by the jury in their verdict; that the time and place of execution of this judgment to be fixed by the further order of this court.

That thereafter, on the 19th day of March, 1900, the defendant, Thomas P. Queenan, filed his motion for a new trial in this cause, which said motion was then and there by the court continued and set over for hearing until the 15 day of February, 1901, which day and time being a regular judicial day of the Feb. term, 1901, of the district court in and for Oklahoma County, O. T.; and thereupon, at said last mentioned date, came on to be heard the defendant's motion for a new trial herein, the Territory of Oklahoma being represented by the Hon. W. R. Taylor,

county attorney of Oklahoma County, O. T., and Herbert Mitchell, assistant county attorney, and Fulton & Chambers, by permission of the court, special counsel employed to prosecute in this cause, and the defendant appearing in his own proper person, as well as by his counsel, Howard & Ames and J. W. Johnson, and the said motion for a
58 new trial being then and there presented to the court, together with the evidence and affidavits offered by the defendant in support thereof, and the court, after hearing said such motion, evidence, and affidavits in support thereof, and being duly advised as to the law in the premises, is of the opinion that the motion is not well taken and that the same should be overruled, and it is therefore ordered, adjudged, and decreed that the said motion for a new trial be, and the same is hereby, overruled; to which judgment of the court the defendant then and there excepted.

That thereafter, on the 16th day of February, 1901, the defendant filed his motion in arrest of judgment herein, and the same being then and there set down for hearing to be heard by this court on the 20th day of February, 1901, at which date the said court being then and there in session, and it being the regular February, 1901, term of said court, and the defendant appearing in his own proper person, as well as by his counsel hereinbefore mentioned, and the Territory of Oklahoma appearing by the said W. R. Taylor, county attorney of Oklahoma County, O. T., as well as by the other counsel hereinbefore mentioned, and the court, having heard the said motion, and being advised as to the law in the premises, is of opinion that the said motion in arrest of judgment is not well taken and that the same should be overruled.

It is therefore ordered, adjudged, and decreed by the court that the said motion of the defendant in arrest of judgment be, and the same is hereby, overruled, to which action and judgment of the court the defendant in open court excepted; and, the court having heretofore appointed the 20th day of February, 1901, as the day upon which the court would pronounce the sentence and judgment of the court against the defendant in this cause, that upon the 20th day of February, 1901, in accordance with the previous order of this court, the said date being a regular judicial day of the February, 1901, term of the district court in and for Oklahoma County, O. T., the defendant having been brought into court, the court informs the defendant, Thomas P. Queenan, that he has been heretofore indicted, charged with the crime of murder for the unlawful killing of Mrs. Ella Queenan, his wife, and further informed him of his plea of not guilty that he had heretofore entered in this behalf, and that by such verdict he had been found guilty of the crime of murder and the death penalty assessed, and thereupon the court asked the defendant whether he had any legal cause to show why judgment should not be pronounced against him at the present time; and the defendant having announced to the court that he had nothing further to say at the present time, the court then and there in the due and lawful manner pronounced the sentence affixed by law for the crime of which the said defendant, Thomas P. Queenan, has been so as aforesaid found guilty by the jury, and then and there, in and by such sentence, decrees that the said Thomas P. Queenan should on the 11th day of April, 1901, at the hour of 12 o'clock noon of said day, within the walls of the county jail

or the jail yard of the county jail of Oklahoma County, O. T., be hanged by the neck until he is dead, dead, dead.

It is therefore ordered, adjudged, and decreed by the court that the said Thomas P. Queenan be executed by being hanged by the neck until he is dead, and that such execution shall take place on the 11th day of April, 1901, at the hour of 12 o'clock noon of said day within the walls of the county jail, or within the jail yard of the county jail of Oklahoma County, O. T., and that he be and is now remanded to the custody of the sheriff of Oklahoma County, O. T.,
59 to be by him safely confined within the walls of the county jail of Oklahoma County, O. T., until the day of execution, when and where he is to remove him for the purpose of carrying out the full judgment of this court; and that the clerk of this court issue a warrant directing the full execution of the judgment and sentence in this behalf against the said defendant, Thomas P. Queenan, and the said sheriff of Oklahoma County, O. T., is directed and required to execute said warrant with dispatch and in the manner and form required by law, and see to it that the said defendant, Thomas P. Queenan, at the time and place aforesaid is so hanged by the neck until he is dead; and that the clerk of said court and the said sheriff of Oklahoma County, O. T., issue and give all due and proper notice. Whereupon, the court notifies the defendant of his right of appeal.

And now, on application of defendant, it is ordered that said defendant be, and he is hereby, given forty-five days in which to make and serve a case made on appeal to the supreme court of the Territory of Oklahoma, the Territory is given ten days thereafter in which to suggest amendments thereto, and said case made shall be signed and settled on five days' written notice by either party.

Done in open court this 20th day of February, 1901.

60 23. The opinion of the supreme court of the Territory, as follows:

No. 1082.

In the supreme court of the Territory of Oklahoma. June term, 1901.
Filed September 4, 1901.

THOMAS P. QUEENAN, PLAINTIFF IN ERROR,
vs.
TERRITORY OF OKLAHOMA, DEFENDANT IN ERROR.

SYLLABUS.

1. The provisions in the Constitution of the United States in relation to trials by jury for crimes, and to criminal prosecutions, apply to the Territories of the United States.

2. The jury, within the meaning of the Federal Constitution, and the sixth amendment thereto, is a jury constituted, as it was at common law, of twelve persons, neither more nor less.

3. A constitutional right can not be waived by the defendant or his counsel in a felony case, but a statutory right may be waived. The right

of the defendant to have a trial by a jury of twelve persons is a constitutional right which the defendant can not waive. It is not within the power of one accused of a felony, by consent expressly given or by his silence, to authorize a jury of less than twelve persons to pass upon his guilt or innocence.

4. At common law the fact that a juror was an alien, or that he had been convicted of a crime, were causes of challenge propter defectum; and there was no distinction at common law between a person who was convicted of a felony and one who was an alien. Most of the States of the Union have statutes which make such disqualifications of a juror a cause of challenge. And these statutes are but declaratory of the common law.

5. Where one of the jurors in a trial for murder had been convicted of a felony, although cause of challenge propter defectum, is not a denial of due process of law or of the equal protection of the laws to the person convicted, within the meaning of the Federal Constitution.

61 6. A known ground of disqualification to a juror, before or during the progress of the trial, is waived by withholding it or refusing or declining to raise the objection until after verdict.

7. In the absence of an express statute making a juror incompetent who has been convicted of a criminal offense punishable by imprisonment in a penitentiary of another State, such conviction and sentence can have no effect by way of penalty or of personal disability or disqualifications beyond the limits of the State in which judgment was rendered.

8. Where irregularities occur in the summoning of a special venire it is incumbent upon the defendant or his counsel to interpose his objection at the proper time, and it is waived if it is raised for the first time after verdict.

9. The provision of our statute in relation to the selecting, summoning, and empanelling of a jury are not mandatory, but merely directory, and hence mere irregularities will not be deemed prejudicial unless it is clearly shown that some injury has resulted therefrom.

10. On a trial for murder, where insanity is interposed as a defense, a nonexpert witness, after testifying to the acts, conduct, and appearance of the defendant, may state whether such acts, conduct, and appearance impressed him as being rational or irrational.

11. On a trial for murder, where the defense of insanity is interposed, the important issue to be determined is the sanity or insanity of the defendant at the time of the commission of the homicide; but it is permissible to receive evidence as to the condition of his mind both before and for a reasonable period after that time as tending to show his mental condition at the time of the homicide.

12. We have examined instruction numbered five, which is assigned as error, and we think it fairly and correctly states the law applicable to this case and comes within the rule announced by this court in Maas v. Territory (63 Pac., 960). And there was no error in refusing to give instruction numbered 4½, which was offered by the defendant, since said instruction was embodied in the general charge of the court.

62 Error from the district court of Oklahoma County, Benj. F. Burwell, trial judge. Affirmed.

J. W. Johnson and Howard & Ames, for plaintiff in error.

J. C. Strang, attorney-general; W. R. Taylor, county attorney; H. B. Mitchell, T. G. Chambers, and M. Fulton, for defendant in error.

Opinion of the court by Hainer, J.:

The plaintiff in error, Thomas P. Queenan, was indicted, tried, and convicted in the district court of Oklahoma County for the crime of murder, and the jury fixed the punishment at death. The court, having duly considered and overruled the motion for new trial, and also in arrest of judgment, sentenced the plaintiff in error to be hanged, in accordance with the verdict of the jury. From this judgment and sentence the plaintiff in error brings the case here on appeal.

A number of errors are assigned and argued by counsel for plaintiff in error, which we will consider in the following order:

1. It is first contended by plaintiff in error that error was committed by the trial court for the reason that it refused to set aside the verdict of the jury on the ground of the disqualification of one of the jurors. It appears from the record in this case that one of the jurors upon his voir dire, in answer to the question whether he had ever been convicted of a felony under the laws of the United States or any State or Territory, answered in the negative. The case proceeded to trial, and after the testimony on behalf of the Territory in chief had been introduced, and the defense had begun to offer its testimony, the juror Harper disclosed the fact that he had been convicted of grand larceny and had served a term in the penitentiary in the State of Nebraska. The court immediately advised counsel for defendant of this fact and asked the defendant's counsel if they had any objection to make to the juror Harper and if they objected to proceeding with the trial of the case with the jury then empaneled. To this suggestion and inquiry of the court Mr. Johnson, one of the counsel for the defendant, made the following response: "We have nothing to say, your honor." The court, in reply to this statement of counsel, used the following language: "In this connection I want to say, in proceeding with this trial, that as soon as this matter was discovered by the court I at once advised counsel for both the prosecution and the defendant, in order that they might avail themselves of any rights they might have under it. I was of the opinion, and

63 am still of the opinion, that if a challenge were properly interposed by either party and the fact properly presented, that it would be ground for excusing the juror. However, such facts are not before me in such a way that I can act upon. * * ." It will thus be seen that counsel for defendant did not request the court to excuse the juror Harper and to empanel a new juror and proceed anew with the trial of the cause, nor was any objection made to the trial proceeding with the jury as thus constituted. But after the trial was completed, and after the defendant was found guilty as charged in the indictment, a motion for a new trial was made upon the ground, among others, that the juror Harper was disqualified, for the reason that he had been convicted of a felony in the State of Nebraska, and therefore the verdict should be set aside. It will thus be seen that the objection

made to the disqualification of one of the jurors was made for the first time after the verdict was returned, and upon motion for a new trial. We think that upon principal and authority this objection comes too late. The defendant by failing or neglecting to object to the disqualification of the juror until after the verdict was rendered, notwithstanding he had knowledge of such fact during the progress of the trial, clearly waived any objection to the disqualification of such juror.

But it is earnestly contended by the able counsel for the plaintiff in error that this is a constitutional or fundamental right which can not be waived by the defendant. We think this contention is unsound.

Article 3, section 2, of the Constitution of the United States provides:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be had at such place or places as the Congress may by law have directed."

And by the sixth amendment to the Constitution it is declared:

"In all criminal prosecution the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

That the provisions of the Federal Constitution in respect to the right of the trial by jury in suits at common law apply to the Territories of the United States is no longer an open question. The doctrine is also well established by decisions of the Supreme Court of the United States that the provisions of the Federal Constitution relating to trial by jury for crimes, and to criminal prosecutions, apply to the Territories of the United States. (Thompson v. State of Utah, 170 U. S., 345; Callan v. Wilson, 127 U. S., 540; Reynolds v. United States, 98 U. S., 145.)

And the jury referred to in the Federal Constitution and the sixth amendment thereto is the jury constituted as it was at common law, of twelve persons, neither more nor less. (Thompson v. State, supra.)

64 A constitutional right can not be waived by the defendant or his counsel in a felony case. But a statutory right, such as the challenging of a juror for any particular cause, is a right or privilege which may be waived by the defendant or his counsel. The right of the defendant to have a trial by a jury of twelve persons is a constitutional right, which the defendant in this case could not waive. It is not within the power of one accused of a felony, by consent expressly given or by his silence, to authorize a jury of less than twelve persons to pass upon his guilt or innocence.

At common law the grounds for challenge were classified under four heads, as follows:

(1) Propter honoris respectum, as if a lord of Parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself.

(2) Propter defectum, as if a juryman be alien born, this is defect of birth.

(3) Propter affectum, as for suspicion of bias or partiality.

This may be either a principal challenge or to the favour.

(4) Challenges propter defectum are for some misdemeanor or crime that affects the juror's credit and renders him infamous, as for conviction of treason, felony, perjury, or conspiracy. (2 Cooley's Blackstone, 3rd ed., 360.)

It will thus be seen that at common law the fact that a juror was an alien, or that he entertained bias or prejudice, or that he was an infant, or that he was not a freeholder, or that he was convicted of a felony, were good grounds for a challenge, and there was no distinction at common law between a person who was convicted of a felony and one who was an alien or who entertained bias or prejudice against the accused. Most States of the Union have statutes which make such disqualifications of a juror a ground of challenge for cause. These statutes are but declaratory of the common law. The fact that a juror is an alien, or that he is an infant, or that he has been convicted of a felony, or that he is not a freeholder, or that he is not an elector, or that he entertains bias or prejudice in a case, are grounds for the exercise of a challenge for cause to such a juror, but the right to make a challenge for such cause may be waived. In other words, it is not a constitutional right or privilege that the accused can not waive, but it is a common law or statutory right of challenge. The right of the accused in all criminal prosecutions under Federal Constitution to a speedy and public trial by an impartial jury of twelve persons, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to be present during the progress of the entire trial, are constitutional rights, which are not in the power of one accused of a felony, by consent expressly given or by his silence, to waive. The power to fix the qualifications of jurors is not a constitutional right, but has always been considered and regarded as a power which has been delegated to the various States and Territories of the Union. And this power has been exercised by the various
65 States and Territories of the Union. And hence, one placed on trial for a felony, may waive any statutory right or privilege which does not contravene any constitutional or fundamental right. It must, therefore, follow that the right to challenge a juror on account of his incompetency, by reason of the fact that he had been convicted of a felony, may be waived by a person who is on trial for a felony, and even in a capital case. And this conclusion of ours is sustained by the great weight of modern authorities. In fact, it has been upheld by the Supreme Court of the United States, and by nearly every State in the Union, with the exception of Michigan and one ro two other States.

In Kohl v. Lehlback (160 U. S., 293) it is held that "where one of the jurors in a criminal case was an alien, although cause of challenge, is not a denial of due process of law, or of the equal protection of the law to the person convicted." And, "The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it."

In discussing this subject the learned Chief Justice of the Supreme Court of the United States said:

"The line of argument seems to be that by the common law as obtaining in New Jersey an alien was disqualified from serving on a jury; that

the disqualifiation was absolute; that the common law could not be changed in that particular under the State constitution; that the proviso was therefore void; and that if an alien sat upon a jury the common law right of trial by jury would have been invaded. So far as the petition shows, this contention may have been disposed of adversely to petitioner by the State courts; and, moreover, we are of the opinion that in itself it can not be sustained as involving an infraction of the Constitution of the United States.

"In Hollingsworth v. Duane, reported in Wall., C. C., 147, and also, but imperfectly, in 4 Dall., 353 (1:864), it was held by the circuit court of the United States for the eastern district of Pennsylvania, at October term, 1801, that alienage of a juror is cause of challenge, but is not per se sufficient to set aside a verdict, and this whether the party complaining knew of the fact or not; and that this was the rule at common law as shown by authorities cited from the Year Books and otherwise.

"In Wassum v. Feeney (121 Mass., 93; 23 Am. Rep., 258) the supreme judicial court of Massachusetts held that a 'verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and empanelled, though the losing party did not know of the infancy until after the verdict.' And Mr. Justice Gray, then Chief Justice of Massachusetts, delivering the opinion, said: 'When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict.' This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relation (Jeffries v. Randall, 14 Mass., 205; Woodward v. Dean, 113 Mass., 297), but even in a capital case, to a juror who was not of the country or vicinage, as required by the Constitution (Declaration of Rights, Art. 13; anonymous, cited by Jackson, J., in 1 Pick., 41, 42). The same rule has been applied by other courts to disqualification by reason of alienage, although not in fact known until after verdict.
66 (Hollingsworth v. Duane, 4 U. S., Dall., 353, Wall., C. C., 147; State v. Quarrel, 2 Bay, 150, 1 Am. Dec., 637; Presbury v. Com., 9 Dana, 203; Rex v. Sutton, 8 Barn & C., 417, same case nom. Rex v. Despard, 2 Man & R., 406.) In re Chelsea Waterworks Co. (10 Exch., 731) Baron Parke said: 'In the case of trial by jury de medietate linguae, which by the 27th section of the jury act is expressly reserved to an alien, he may not know whether proper persons are on the jury; yet if he was found guilty, and sentenced to death, the verdict would not be set aside because he was tried by improper persons, for he ought to have challenged them.' (See also case of 'Juryman, 12 East, 231, note; Hill v. Yates, 12 East, 229.')

"The great weight of authority is to that effect, though there are a few cases to the contrary. Thus, in Guykowski v. People (2 Ill., 476) it was held that a new trial should be granted because one of the jurors was an alien when sworn, of which fact the defendant was ignorant at the time; but in Greenup *v.* Stoker (8 Ill., 202) the supreme court of Illinois, through Purple, J., reluctantly concluded that it was not indispensable to hold that that case was not the law, but limited its application to capital cases; and in Chase *v.* People (40 Ill., 352) it was finally overruled. Mr. Justice Breese spoke for the court, and it was held that alienage in a juror was not a positive disqualification, but ground of exemption or of challenge and nothing more.

"It has been held that under the constitution of New York the defendant in a capital case can not consent to be tried by less than a jury of twelve men (Cancemi v. People, 18 N. Y., 128), and that, under the constitution of California, a law authorizing a change of the place of trial of a criminal action to another county than that where the crime was committed, on application of the prosecution without defendant's consent was invalid (People v. Powell, 87 Cal., 348, 11 L. R. A., 75); but in neither of these cases was it intimated that objection to individual jurors could not be waived by the accused, or that trial by jury would be violated if persons who were open to challenge happened to be impaneled. The disqualification of alienage is cause of challenge propter defectum, on account of personal objection, and if, voluntarily or through negligence or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it. (United States v. Gale, 109 U. S., 65, 72; 127: 857, 859.)"

In the case of Alexander v. United States (138 U. S., 353) it was held that "it is the duty of counsel seasonably to call the attention of the court to any error in empaneling the jury, in admitting testimony, or in any other proceedings during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception."

In case of King v. Sutton (8 B. & C., 417) it was held that "alienage is a ground of challenge to a juror, and if the party has an opportunity of making his challenge and neglects it, he can not afterwards make the objection."

67 In the case of Chase v. The People, 40 Ill., 352, it was held that "alienage in a juror is not a positive disqualification; it simply enables him to excuse himself if he chooses to claim exception, or it is a ground of challenge and nothing more."

In Costly v. State, 19 Ga., 614, it was held that "the nonresidence of a juror, being a cause of challenge propter defectum, can and consequently must be made by the prisoner before the juror is sworn, and it makes no difference whether such want of qualification was known or unknown at the time the juror was sworn."

In State v. Bunger, 14 La. An., 465, it is said: "Where a juror can be challenged for cause, the right must be exercised before the juror is sworn; and a verdict cures the defect."

In State v. Patrick, 3 Jones (N. C.) L., 443, it is said: "It is too late after the juror has been taken and accepted by the prisoner, and has served on the trial, to except him for incompetency."

So, it has been held that where the facts are known, an objection to the competency of the juror comes too late if it is made after verdict, even in capital cases. (People v. Coffman, 24 Cal., 230; Lisle v. State, 6 Mo., 426; Keener v. State, 18 Ga., 194.)

In State v. Powers, 10 Ore., 145, it was held that the disqualification of a juror in a capital case is unavailable after verdict.

In George v. State, 39 Miss., 580, a motion for new trial in a capital case was denied, in which it was found after the verdict that one of the jurors was an alien. In State v. Jackson, 27 Kan., 581, it was held that—

"In a criminal prosecution for murder in the first degree, it was ascertained after the verdict was rendered that two of the jurors had voluntarily borne arms against the Government of the United States during the war of the rebellion, and their consequent disabilities had not been removed, and therefore that they were not electors of the State of Kansas, and therefore were not proper persons to serve as jurors. No objection had previously been made to these jurors serving in the case, and it does not appear that any effort had been made, previous to the rendering of the verdict, to ascertain whether they were competent jurors or not. After the verdict was rendered, and the defendant found guilty of murder in the first degree, as charged in the information, the defendant then moved for a new trial, and also in arrest of judgment, because of the incompetency of these two jurors. Held, That the fact that these two jurors were not electors was not an absolute disqualification, but only a ground for challenge that their disqualification would have been a proper ground for discharging them from the jury before they were sworn, but it is not sufficient ground for granting the defendant a new trial, or for arresting the judgment after the verdict was rendered; and where no objection is made because of such disqualification until after the verdict is rendered, the objection is made too late."

In State v. Ready, 26 Pac., 58, it was held by the supreme court of Kansas that—

68 "When a juror examined on his voir dire said that he had not served upon a jury in any court of record in this State within twelve months, and it is shown that he had, and the fact of the prior service of the juror was not known to the appellant until after the trial, the fact of the prior service of the juror is not sufficient to grant him a new trial. The case of State v. Jackson, 27 Kan., 581, followed."

And it was further held that—

"Where an objection to the incompetency of a juror—namely, that he has served as a juror in the same court in another case within the preceding year—is first raised after verdict, and the party objecting fails to show that the ground of challenge was unknown to him and his counsel when the juror was accepted, or that he would have exercised his right of challenge if he had known that the cause therefor existed, or that he has suffered any prejudice by the retention of the juror, the objection will not be available for the purpose of obtaining a new trial."

In the case of Stewart v. The State, 15 Ohio St., 159, it is said:

"The plaintiff in error, defendant below, was put on trial for a penitentiary offense. After the jury had been impaneled and sworn, a juror arose in open court and stated that he had been one of the grand jurors by whom the indictment had been found. Pertinent inquiries had been openly made upon this subject by counsel for the State before the jury was sworn, to which the juror had failed to respond. The defendant's counsel thereupon, in answer to an inquiry by the court, objected to proceeding in the trial with the jury then impaneled, and at the same time declining to waive any of the defendant's right. The jury was thereupon discharged by the court and another jury was impaneled in the usual mode, and the trial proceeded, the defendant objecting thereto. Held—

"That the discharge of the jury first impaneled was the necessary result of sustaining the objection interposed by the defendant himself, and so did not take place without his consent, but was an act done at his own instance and would not therefore act as an acquittal nor bar a further prosecution."

Mr. Justice Scott, in delivering the opinion of the court, said:

"Indeed, looking to the whole colloquy which took place between the court and counsel, it is quite evident that the defendant desired to be regarded as consenting to nothing which might in any respect prejudice his possible rights in any stage of the trial, and that he desired to secure for himself, by objecting to proceeding with the trial, the full right and benefit, in the event of his conviction, of a motion for a new trial on account of the fact when first disclosed, and at the same time, if possible, to obtain all the chances of acquittal from the jury then impaneled by refusing to consent to its discharge. He had a clear right to one fair and legal trial by an impartial jury, but his right to demand two trials as a prerequisite to legal conviction and sentence can not be conceded.

69 Nor can he reasonably be allowed to acquire such an advantage by occupying at the same time two positions utterly inconsistent with each other. There were but two possible courses of action open to the court—either to proceed with the trial before the jury then impaneled, or to discharge the jury. It was simply impossible not to do either, and a direct and absolute objection to the one was necessarily a demand for the other. The jury was not discharged until the defendant's counsel had been asked in open court if they objected to proceeding in the trial with the jury then impaneled and had replied explicitly that they did. The objection thus openly and directly made was—and, under the circumstances, perhaps properly—sustained by the court; and as a necessary and unavoidable result the discharge of the jury followed."

In vol. 17, p. 1161, of the American and English Ency. of Law, the rule is thus stated:

"Generally an objection to a juror for incompetency from any cause is waived if not made before verdict. The disqualification of a juror has, however, been frequently made the ground of an application for a new trial or other relief after verdict, and the courts have not been in unison in their action on such applications. It is agreed that one who knew of a ground of disqualification before or during the trial cannot present such objection for the first time after verdict, and he must actually show the want of such knowledge on his part."

In vol. 12, p. 557, of the Encyclopædia of Pleading and Practice it is said:

"If rumors affecting the conduct of a juror are of so serious a character as to require a dismissal of the jury and the empaneling of another, it is incumbent upon counsel to move in the matter upon information of the prevalence of the rumor, and they cannot sit silently by and speculate upon the result."

Thompson, in his work on Trials, sec. 114, lays down the following rule:

"A known cause of challenge is always waived by withholding it and

raising it as an objection after verdict, since such a practice is incompatible with the good faith and fair dealing which should characterize the administration of justice."

And again, the same author in the same section, in discussing this subject, used the following language, which is clearly applicable to the facts in this case:

"For counsel to sit in silence when the court is embarrassed in the process of the impaneling of a jury, declining to take an action on the suggestions of the court and answering that they have nothing to say and then raising the proper objection in case the verdict goes against them, is a trifling with the court and with the administration of justice which will not be tolerated on the trial of the gravest offenses."

But is Harper disqualified from serving as a juror in this Territory because he was convicted of a felony in the State of Nebraska? We think this question must be answered in the negative.

70 Section 3093 of the statutes of 1893 provides as follows:

"All male citizens residing in any of the counties of this Territory, having the qualifications of electors, and being over the age of twenty-one years, and of sound mind and discretion and not judges of the supreme court or district courts, clerks of the supreme or district courts, sheriffs, coroners, licensed attorneys engaged in practice, or any person licensed to sell liquor, or an habitual drunkard, or jailers, and not subject to any bodily infirmity amounting to disability, and who have not been convicted of a criminal offense punishable by imprisonment in the penitentiary, and not subject to disability for the commission of any offense which by special provision of law does or shall disqualify them, are and shall be competent persons to serve on all grand and petit juries within their counties or subdivisions, respectively * * * ."

Section 2, chapter 13, of the session laws of 1899, in relation to the qualification of electors in this Territory, provides as follows:

"The term 'qualified electors' within the meaning of this act, shall include all male persons of the age of twenty-one years or upwards belonging to either of the following classes, who have resided in the Territory for the period of six months, in the township sixty days, and in the voting precinct thirty days preceding any election: First, citizens of the United States; second, persons of foreign birth who shall have complied with the provisions of the laws of the United States on the subject of naturalization; third, civilized persons of Indian descent, not members of any tribe."

Under section 5183 of our Code of Criminal Procedure a conviction for a felony is a general cause of challenge. A felony under our criminal code is defined to be a crime, which is, or may be, punishable with death or by imprisonment in the Territorial prison.—Section 1841, statutes of 1893.

There is no express provision in our statutes which renders a person disqualified from serving as a juror in this Territory who was convicted of a crime in any other State or Territory. In the absence of an express statute making a juror incompetent who has been convicted of a criminal offense punishable by imprisonment in the penitentiary in another State, such conviction and sentence can have no effect by the way of penalty or personal disability or disqualification beyond the limits of the

State in which the judgment was rendered. This is the rule laid down in the case of Logan v. United States, 144 U. S., 263, where Mr. Justice Gray, speaking for the court, said:

"At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the State which enacts it to a conviction and sentence in another State, such conviction and sentence can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the State in which the judgment is rendered. (Wisconsin v. Pelican Ins. Co., 127 U. S., 265; Com. v. Green, 17 Mass., 515; Sims v. Sims, 75 N. Y., 466; National Trust Co. v. Gleason, 77 N. Y., 400; Story, Confl. L., sec. 92; 1 Greenl. Ev., sec. 376)."

71 It must therefore follow that the conviction of the juror Harper for a felony in the State of Nebraska, and his sentence to the penitentiary in said State, did not make him an incompetent juror in the trial of this case.

2. It is next contended that the court erred in refusing to grant a new trial for the reason that there were certain irregularities in the summoning of the special venire. There is no merit in this contention. It appears from the record that the court ordered a special venire of sixty jurors, and the sheriff made return of sixty-one jurors. No objection was made by counsel or defendant to the manner in which the special venire was ordered or the return thereof by the sheriff, and the objection was raised for the first time on motion for new trial. There is no showing made that any injury resulted by reason of any irregularity in the summoning of the jury, or the return thereof by the sheriff. This court has held that the provisions of our statute in relation to the selecting, summoning, and impaneling of a jury are not mandatory, but merely directory; and mere irregularities will not be deemed prejudicial, unless it is clearly shown that some injury has resulted therefrom. Huntly v. Territory, 7 Okla., 60; Harmon v. Territory, 9 Okla., 313.

In Huntly v. Territory, supra, it was said: "Unless we could say that such error affected the substantial rights of the defendant or might have affected his substantial rights injuriously, we would not be justified in disturbing the verdict."

But if irregularities occur in the summoning of a jury, it is incumbent upon the defendant to interpose his objection at the proper time, and we think it is waived if it is raised for the first time after verdict.

In Perry v. State, 45 S. W., 566, it was held by the court of criminal appeals of Texas that objections to the irregularities in regard to a special venire can not be made for the first time after verdict.

3. Error is assigned that the court refused to admit certain competent and relevant testimony of non-expert witnesses on behalf of the plaintiff in error. It is stated in the brief that the court refused to allow the witnesses, particularly John J. Queenan and Alice Welch, who were specially familiar with the defendant, to testify as to impressions made upon them by the conversation, conduct, and appearance of the accused. We have carefully examined the testimony of these witnesses, and we do not think that this is a fair statement of the record. The record discloses that the court permitted these witnesses to testify as to the actions, conduct, and appearance of the plaintiff in error, and to state how such

actions, conduct, and appearance impressed them, and permitted them to give their opinion as to whether they believed from such acts, conduct, and appearance the defendant was sane or insane. But we think the court properly refused to allow these witnesses to testify to a mere conclusion, as that the conduct and appearance of the defendant had a "dreadful effect" or "a horrible effect" upon them. Thus, the following question was propounded to the witness Alice Welch by counsel for defendant:

Question. "What effect did it have upon your mind at that time when you saw him?"

72 Answer. "It had a dreadful effect." The court instructed the jury not to consider this answer, it being a mere conclusion of the witness. The following question was then asked of the same witness:

"You may state, Miss Welch, whether upon this matter, his conduct and appearance, and what you heard and observed in all, how it impressed you as to whether or not his mind was affected or wrong, or whether he was insane." To this question the Territory objected, which was overruled by the court. Answer. "Yes, sir; it affected me—made an impression upon me that there was something wrong with his mind." Question. "How is that?" Answer. "Made an impression upon me that there was something wrong with his mind."

We think that the ruling of the court was very favorable to the defendant. The ruling of the court not only permitted the witnesses to testify as to the acts, conduct, and appearance of the defendant, but it permitted the witnesses to give their opinions as to whether or not they believed the defendant to be sane or insane from such acts, conduct, and appearance. We think the true and sound rule is that non-expert witnesses after testifying to the acts, conduct, and appearance of the accused as to his physical or mental condition, may state whether such acts, conduct, and appearance impressed them as rational or irrational. But they can not be permitted to give an opinion as to the general soundness or unsoundness of the mind of the accused, or as to his mental capacity. And this is the rule laid down by the court of appeals of New York in a number of well-considered cases.

In People v. Strait, 42 N. E., 1045, the court, in discussing this question, said:

"The rule is that persons not experts, after testifying to facts and incidents in relation to a person tending to show soundness or unsoundness of mind, may testify to the impression produced upon them thereby, and as to whether the acts and declarations testified to impressed them as rational or irrational; but they can not be permitted to give an opinion as to the general soundness or unsoundness of mind of the person, or as to his mental capacity. (Clapp v. Fullerton, 34 N. Y., 190; O'Brien v. People, 36 N. Y., 276; Hewlett v. Wood, 55 N. Y., 634; Holcomb v. Holcomb, 95 N. Y., 316; People v. Packenham, 115 N. Y., 200, 21 N. E., 1035; Paine v. Aldrich, 133 N. Y., 544, 30 N. E., 725; People v. Taylor, 138 N. Y., 398, 34 N. E., 275.)"

4. Error is assigned, and it is claimed in the brief of the counsel that the court erred in confining the witnesses to opinions formed before the act was committed, and upon facts and circumstances prior to its occurrence. The record discloses that the court permitted the witnesses to detail the acts, conduct, and appearance of the defendant not only before

but after the homicide was committed. Thus, the witness Thurston, on behalf of the defendant, was permitted to detail the appearance and conduct of the defendant shortly after the homicide was committed, as will appear from the following question, which was propounded to him by counsel for defendant: Question. "From all that you saw of him, in his conduct, your associations with him, and your conversation with him, are you prepared to say whether you believed him at that time insane or not?" Answer. "I formed the opinion that he was not in his right mind."

73 Question: "Formed it upon what you knew of him and his conduct, conversation, and appearance?"—Answer. "That is what I formed it from, from his general conduct and appearance." By the Court: "Gentlemen of the jury: This condition subsequent to the time of the homicide, and the opinion which he formed subsequent to that time based upon his acts subsequent to that time can be considered by you only for the purpose of tending to show as to whether or not he was insane at the time of the homicide." We think the court, in this statement to the jury, announced the correct rule.

In vol. 16, p. 614, of the American and English Encyclopædia of Law (second edition), the rule is thus stated:

"But in order to ascertain a person's mental condition at the time of the act in question, it is permissible to receive evidence of the condition of his mind for a reasonable period both before and after that time, especially where it is claimed that his disorder is of a continuing or permanent character, and this evidence should be considered by the jury in connection with the other facts and circumstances of the case."

In State v. Newman, 47 Pac., 881, the following doctrine was announced by the supreme court of Kansas:

"Where the defense of insanity is interposed in a prosecution for murder, the important question is the mental capacity or incapacity of the defendant at the time of the homicide; but testimony as to his state of mind shortly before and shortly after the homicide may be received as tending to show his mental condition at the time of the homicide."

We are of the opinion there was no error committed by the trial court in the admission or exclusion of competent and relevant testimony.

5. It is next claimed that the court erred in giving instruction numbered five, which reads as follows:

"Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong, and to comprehend and understand the consequence of his act, is excusable for any act in reference to which his mind is in such weakened condition. But it is not every derangement of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequence of such act, the law recognizes him as sane, and holds him responsible for such acts; and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequence of such act, then and in that event it will be your duty to find

the defendant guilty of murder as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to compre-
74 hend and understand the consequences of such act, then you should find the defendant not guilty."

We think that this instruction fairly and correctly states the law applicable to this case, and comes within the rule announced by this court in Mass v. Territory, 163 Pac., 960. And there was no error in refusing to give instruction numbered 4½, which was offered by the defendant, since said instruction was covered by the general charge of the court.

Upon a careful examination and consideration of the entire record we are of the opinion that no error was committed by the trial court prejudicial to the substantial rights of the plaintiff in error. The judgment of the district court is therefore affirmed.

All the justices concurring except Burwell, J., who, having tried the cause in the court below, not sitting.

The foregoing is selected as that part of the record to be printed.

THOMAS P. QUEENAN,
Plaintiff in Error.

By J. W. JOHNSON,
C. B. AMES,
H. H. HOWARD,
His Attorneys.

75 Due service of the above and foregoing parts of the record in the case of Thomas P. Queenan, plaintiff in error, vs. the Territory of Oklahoma, defendant in error, is hereby acknowledged this 5th day of April, 1902.

J. C. ROBBERTS,
Attorney-General for the Territory of Oklahoma.
W. R. TAYLOR,
County Attorney of Oklahoma County.

(Indorsement on cover.) File No. 18410. Supreme Court, U. S., October Term, 1901. Term No. 246. Thomas P. Queenan, plaintiff in error, vs. The Territory of Oklahoma. Assignment of errors and designation by plaintiff in error of parts of record to be printed. Filed April 19, 1902.

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IN THE SUPREME COURT OF THE UNITED STATES.

THOMAS P. QUEENAN,
Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA
Defendant in Error

Now comes Thomas P. Queenan, Plaintiff in Error, and says that in the Record and proceedings in the above entitled cause there is manifest error and respectfully presents the following as his Assignment of Errors, to-wit:

First: The Court erred in affirming the action and Judgment of the Honorable District Court. And erred in denying the petition of Plaintiff in Error for a re-hearing of said cause.

Second: The Court erred in holding that the opinion of non expert witnesses as to the mental condition should be confined to the opinion formed before the homicide; and erred in not passing upon the ruling of the Honorable Trial Court on this question as made when refusing to hear the testimony of the witness John H. Beatty. The Trial Court held it incompetent for the witness to express (at the time of the trial) his opinion then as to what was the mental condition of Plaintiff in Error immediately prior to the homicide; and by its ruling forestalled enquiry into this matter by forbidding the witness to state any opinion formed since the homicide. See Record 476 to 480. Printed Record 22.

Third: The Court erred in holding the following instruction to be the law, to-wit:—

"Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong, and to comprehend and understand the consequences of his act, is excusable for any act in reference to

which his mind is in weakened condition. But it is not every derangement of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, the law recognizes him as sane, and holds him responsible for such act, and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequences of such act, then in that event, it will be your duty to find the defendant guilty of murder, as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

Fourth: The Court erred in sustaining the Honorable Trial Court in refusing the following Special Instructions asked by Plaintiff in Error, to-wit:

No. 3. "If from a consideration of all the evidence you entertain a reasonable doubt as to whether or not the mind of the defendant at the time he shot and killed Ella Queenan, if you believe from the evidence beyond a reasonable doubt that he did shoot and kill Ella Queenan, was so affected by insanity as to render him unable to distinguish between right and wrong or to know that his act was wrong you should acquit him."

No. 4½. "A person partially deprived of reason is incapable of committing crime if at the time of committing the wrongful act he is incapable of knowing its wrongfulness, and the jury cannot return a verdict of guilty in this case unless they believe from the evidence, and to the exclusion of every reasonable doubt, that at the time the act was committed the defendant was so fully possessed of his reason as to know the wrongfulness of his conduct."

Fifth: The Court erred in holding that the petit juror, J. F. Harper, was a qualified juror. The juror Harper had been convicted of a felony, for which crime he had served a term of imprisonment in the state pententiary of Nebraska; but his disqualification was not discovered until the testimony in chief of the Territory was in and much of that of the Defendant. Having been convicted of a

felony he was incompetent under the law and his verdict a nullity.

Sixth: The Court erred in holding that the Plaintiff in Error waived the disqualification of the juror Harper.

Wherefore, the said Thomas P. Queenan prays that the Order of said Supreme Court of the Territory of Oklahoma be reversed and said cause remanded for further proceedings and the correction of said Errors.

THOMAS P. QUEENAN,
Plaintiff in Error.

By J. W. JOHNSON,
C. B. AMES,
STILLWELL H. RUSSELL,
H. H. HOWARD,
his Attorneys.

In the Supreme Court of the United States,

October Term, 1902.

THOMAS P. QUEENAN,
Plaintiff in Error,

vs.

TERRITORY OF OKLAHOMA,
Defendant in Error.

No. 246.

Error to the Supreme Court

OF THE

Territory of Oklahoma.

STATEMENT.

The plaintiff in error, on January 27, 1900, shot and killed his wife. They had been married four or five years, and had one child, a girl three or four years old. Their place of residence at the time was upstairs in a two-story frame business building. He returned home at about the noon hour, and within a few moments after his arrival fired the shot. The shooting occurred in the kitchen where she was preparing the midday meal. No witness was present. He then leaped through the closed window, carrying broken glass and a part of the sash with him to the ground, where he was found disabled with the empty pistol near by. Their relations were and at all times had been affectionate. He was of a kindly and inoffensive disposition, never having done or offered violence to any one.

No motive appears for the act, and no explanation, except it be found in his mental condition. He was convicted and the death penalty pronounced against him. Insanity was the only defense. Several errors are assigned.

I.

John H. Beaty, attorney, was called as a witness for defendant. His testimony is found, commencing at page 476 of the record, and page 22 of the printed record. He testifies to a long and intimate acquaintance with defendant and to his conduct shortly preceding the homicide, but says that at the time of observing the conduct he formed no opinion as to the sanity of defendant. Having later recalled this conduct he formed an opinion which he is asked to express. No objection is made that the facts are not sufficiently stated by the witness, or that the facts stated are not sufficient upon which to base an opinion. The objection is as to the competency of the testimony, because the witness is asked for his opinion at the time of testifying as to the mental condition of the defendant at the time his conduct was observed. And the court holds that it "is incompetent for the purpose of this trial," to which an exception is taken. Page 24.

That a non-expert, after stating the facts upon which it is based, may give his opinion as to mental condition seems generally to be accepted, and is held by this court.

Life Ins. Co., v. Lathrop, 28 U. S. L. ed., 536.

And this opinion must be that of the witness at the time of his examination.

Runyan v. Price, 15 Ohio S., 1.

And the fact that the witness did not form his opinion at the time he observed the facts on which it is based, but afterwards, does not effect its competency.

Buswell on Insanity, Sec. 246, citing
Hathaway v. Life Ins. Co., 48 Vt., 335.

It is held to be the correct practice to call for the opinion of the witness at the time of the delivery of his testimony for the reason that subsequent consideration and reflection may have changed an opinion formed at the time the facts were observed by him. Runyan v. Price (Supra): 86 Am. Dec., 468. Clevenger, Med. Juris. Vol. 1, 589.

An expert, as a rule, forms his opinions from facts related, while a non-expert forms his from a personal knowledge of the facts, and in this distinction is found the only limitation governing the admissibility of the opinions of the two classes.

It is immaterial when an expert forms his opinion, but it is material that the opinion testified to must be the one entertained at the time of the trial, and why not apply the same rule to a non-expert? Why should the time when it is formed be the test with the one and not with the other?

The prime inquiry is, has the non-expert a personal acquaintance with the facts upon which he has formed the opinion? Observation establishes his right to the opinion and it becomes evidence within certain limitations, its competency being judged by its pertinency to the facts stated by him.

An opinion is but a conclusion arrived at from an ascertained condition, and expressed by one who has had opportunities of observation becomes the statement of a fact. Ins. Co. vs. Lathrop, 111 U. S., 537.

An opinion necessarily springs from an antecedent condition and when permitted expression, it must be an opinion of the present.

The Court will observe that the conclusions were the same, but an opinion formed at the time could have changed. The tree does not fall from the blossom but the blossom from the tree. The facts do not spring from the opinion but the opinion from the facts. The facts being unchanged, what difference when the conclusion from them is reached, so it be adhered to at the time it is to become evidence?

A conclusion may never be reached or it might be the product of reflection and consideration and if it should be, is time when it ripens the test, or is it not safer and more reasonable to ascertain that it is an opinion of the present based upon a pre-existing knowledge of facts that give it credence as an inference correctly drawn?

Suppose the witness Beaty had answered that at the time he observed the facts he formed an opinion, but that reflection had changed it, which of the two would be recognized as competent? Or when he observed the facts he formed the opinion that Plaintiff in Error was crazy, but his present opinion from the same

facts was that he was not, would it be competent to force the witness to foreswear himself and make evidence out of that which had become obsolete? We think not.

Suppose a juror on his *voir dire* should answer that when the merits of the case were related to him he did not form an opinion, but that subsequent reflection had produced a fixed opinion, would he be a competent juror? He would be under the ruling complained of.

The witness Beaty was among the last who observed the conduct of Plaintiff in Error. His opinion of that conduct was both material and pertinent, as such evidence is never regarded as cumulative. Its rejection was hurtful, because the jury was confronted with a witness whose acquaintance with and observation of Plaintiff in Error would render any conclusion reached by him of the same dignity as a statement of a fact.

II.

The fifth instruction, found at page 651 of the record, printed page 25, is assigned as error. The portion particularly complained of is the following: "But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

This, it seems to us, charges the jury that, in order to acquit, they shall find not only that he did not know the wrongfulness of the act, but also that he was unable to comprehend and understand its consequences.

By Section 1852 of the Oklahoma Statutes of 1893, it is provided:

> "All persons are capable of committing crimes, except * * * * * lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness."

The only statutory test is his inability to know the wrongfulness of the act: the instruction enlarges the disability to a want

of capacity to comprehend and understand its consequences; that is, before acquitting him, it must appear to the jury not simply that he did not know the wrongfulness of the act, but also that he was unable to understand its consequences. And how far into the consequences he must be unable to see, as the jury would understand the language used, we could only know by inquiring of them. Did they understand that he must be unable to comprehend the mere physical consequence, as that death would follow the shooting; or the mere legal consequence, as that arrest and punishment would follow? Most likely not more than this, and if so, we submit that according to the history of insane acts, the maniac usually understands, or knows, this and more, often laying his plans with care and calculating the consequences with correctness, seldom seeking to escape, frequently seeking to procure the most natural consequences, being unable to know the wrongfulness of the act causing them, or deluded into the belief that the act is rightful and the consequences beneficial.

We think this is an enlargement of the mental incapacity provided by the Statute, and so worded as to be prejudicial to the defendant.

The objectionable instruction in full is as follows:

"Homi committed by one who has not sufficient knowledge and understanding to understand right from wrong, and to comprehend and understand the consequences of his act, is excusable for any act in reference to which his mind is in weakened condition. But it is not every derangement of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, the law recognizes him as sane, and holds him responsible for such act, and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequences of such act, then in that event, it will be your duty to find the defendant guilty of murder, as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

In the opinion affirming this case the Supreme Court of the Territory holds that the instruction fairly states the law and comes within the rule announced by it in Mass. vs. Territory, 63 Pac., 961, notwithstanding the rule announced in that case is as here given:

"But no matter what the condition of a defendant's mind at the time of committing an act which the Statute declares to be criminal, he can only be excused, where his defense is lunacy, insanity or unsoundness of mind, upon proof that he was incapable of knowing its wrongfulness."

We do not take issue with the rule as announced, as it is the language of the Statute and is in keeping with the humanity of the law declared by this Court, but we do take issue with the suggestion, "that the incapacity to know the wrongfulness of an act embraces necessarily the incapacity to understand the nature and consequences of the same." The conditions are not convertible.

That they are not so is recognized by the decisions of this Court.

Ins. Co. vs. Terry., 15 Wall, 581,
Clevenger. Med. Jur. Insan. Vol. 1 p. 410 S. 6.
Ritter vs. Life Ins. Co., 169 U. S., 149-150.

The law requires that an accused be ignorant of the character of the act as a crime and not an ignorance of the mere act itself. He could know that he was taking the life and with sufficient intelligence to employ the necessary weapon to accomplish his purpose, and at the same time be unconscious that he was committing a crime. His darkened mind may not have enabled him to appreciate the moral consequences of his act, yet having capacity enough to understand its physical nature.

Bigelow vs. Ins. Co. 3rd, Otto., 228.

The Honorable Trial Court's instructions in effect say:

"Gentlemen of the jury, while you may believe from the evidence that defendant at the act was not capable of understanding its wrongfulness, yet, if he had capacity to understand the probable consequences of the act, you should convict him."

A mind so far bankrupt as to be unable to know the wrongfulness of an act, and unable to comprehend and understand the physical consequences or effect of the act, is reduced to such extremity as to make an act no more the act of such a mind, in the sense of the law, than if impelled by irresistible physical power. Ins. Co. vs. Broughton, 109 U. S., 131.

An insurance company cannot as a condition precedent to the payment of a policy upon the life of an assured who has taken his own life, require it to be shown that at the time of the act he was incapable of knowing its wrongfulness and incapable of understanding the consequences of it, for the reason that if the intellect is thus distressed it would be so far bereft of reason that the act would be no more his act in the sense of the law than that of the instrument used when committing it.

Ins. Co. vs. Broughton, 109 U. S. 131.
Ins. Co. vs. Rodel, 95 U. S. 241.
Ins. Co. vs Terry, 15 Wallace, 581.
Ins. Co. vs. Akens, 150 U. S., 473.

Plaintiff in Error excepted to the instructions of the Court and submitted three special instructions, two of which, Nos. 3 and 4½, Record page 29, are as follows:

No. 3. "If from a consideration of all the evidence you entertain a reasonable doubt as to whether or not the mind of the defendant at the time he shot and killed Ella Queenan, if you believe from the evidence beyond a reasonable doubt that he did shoot and kill Ella Queenan, was so affected by insanity as to render him unable to distinguish between right and wrong or to know that his act was wrong you should acquit him."

No. 4½. "A person partially deprived of reason is incapable of committing crime if at the time of committing the wrongful act he is incapable of knowing its wrongfulness, and the jury cannot return a verdict of guilty in this case unless they believe from the evidence, and to the exclusion of every reasonable doubt, that at the time the act was committed the defendant was so fully possessed of his reason as to know the wrongfulness of his conduct."

The requested instructions state the law applicable and draw

the attention of the Honorable Trial Judge to the essential distinction between those given and those refused.

Pierce vs. Trav. Ins. Co., 34 Wis., 389,
Waters vs. Ins. Co., 2 Fed. Rep., 892.

If an assured when killing himself understood at the time the physical consequences but was incapable of knowing the wrongfulness of the act, would be too irresponsible to defeat a recovery upon his policy, how does it vary the rule if in the same state of mind he killed his wife?

Inmates of a lunatic asylum often kill their keepers, not knowing the moral wrong, but understanding the consequences will be death to the keeper and escape for themselves.

Madmen have no faculties that are capable of appreciating the moral aspect of any act, but there are faculties left to them in the mysterious matter from which there comes thought and make them the "cunningest patterns of excelling nature," and none are more conscious of the ruin wrought.

The instructions were hurtful and easily understood by the jury when what was said by Plaintiff in Error just preceding and said and done by him immediately subsequent to the shooting is for a moment considered. A witness testified to what was said by the husband and wife a few minutes before the shooting. Pages 326, 329, 336, 340. Then came the fact that Plaintiff in Error jumped from a second story through the glass to the pavement and when seen writhing and groaning, in reply to the question if he was hurt, said that he had shot his wife and child. In view of what was said and done by Plaintiff in Error, it was easy for the jury to believe he understood what he had done and was, therefore, able to understand the consequences of his act, and at the same time believe that he did not know its wrongfulness.

The distinction between the conditions of the mind that could foresee the consequences or have knowledge of them and the capacity to know whether it was right or wrong, was evidently made an issue at the trial, else why refuse the requested instructions on that point and iterate and re-iterate the contrary in those given by the Court?

III.

One of the jurors, J. F. Harper, was convicted of grand larceny in Pawnee County, State of Nebraska, on September 21, 1881, and sentenced to and served in the penitentiary of that State for a term of fifteen months. The record is found at pages 669 to 675, and in printed record at pages 33 to 37. On his voir dire he twice answered that he had never been convicted of a felony under the laws of the United States or any State or Territory. Record pages 234 and 227, and printed pages 7 and 12.

After the testimony in chief for the Territory and that of the greater number of the witnesses for the defendant was in, the Court in a manner not disclosed by the record was advised of the juror's disqualification, and communicated the information to the attorneys for the respective parties, neither of whom had any information on the subject before. The Court then caused the jury to retire and the attorneys retained for the prosecution gave formal notice of the fact to the attorneys for the defendant, that they might examine "into the matter for the purpose of challenging the juror for cause." The defendant said and did nothing.

The court then observed that the facts were not before him in such a way that he could act upon them, but expressed the opinion that if either party should properly present the facts and challenge the juror there would be ground for excusing him.

With this the trial proceeded. Record page 456, Printed pages 12 and 13.

1. Was the juror subject to challenge at the time?

"When twelve men are called as jurors, the defendant must be informed by the court or under his direction, of his right to challenge the jurors, and he must do so before the jury is sworn to try the cause."

Okla. S. Sec. 5157.

"It must be taken when the jury is full and as soon as one person is removed by challenge, another must be put in his place until the challenges are exhausted or waived. The court for good cause shown may permit a juror to be challenged after he is sworn to try the cause, *but not after the testimony has been partially heard.*

Okla. S. Sec. 5177.

If there is virtue in these provisions of the Statutes, it seems to us that the suggestion of court and counsel related to a matter which we had no right to demand and the court had no power to grant.

And it cannot be put in answer that the challenge could have gone to the panel, for that "is an objection made to all the trial jurors returned," and "must be taken before a juror is sworn."

Okla. S. Sec. 5166 and 5168.

These sections of the Statutes seem to be purely declaratory. There is, however, a departure in the manner of swearing the jurors. Originally it was the practice to swear each juror separately as he was called, qualified, passed and accepted by the parties. And "after he had touched the book, by authority of the court, it was too late to challenge him for either cause or favor, or peremptorily."

In some of our courts, as in Oklahoma, this rule has been relaxed in so far as to allow a challenge for cause after the jury has been sworn, but before testimony has been taken. And by statute in some places the court is authorized to use the remaining jurors in forming a new jury in case of a mistrial. This modification seems to arise out of and be limited by a substantial reason: the challenge is allowed after the oath has been administered and before the testimony is taken "for good cause shown" as a matter of substantial economy without material injury "particularly if the cause or favor could have been made the ground for a new trial."

United States v. Davis, 103 Fed., 457.

2. Did the defendant forfeit his rights by failing to act?

It would seem to us that if the juror was not subject to challenge at the time of discovering his disqualification, it would be charging the defendant with extraordinary diligence to hold that, in order to preserve his rights, he must demand of the court that to which he was not entitled and the court had no authority to grant. And what the power of the court upon his own motion or at the request of the prosecuting attorney was as to declaring

a mistrial, discharging the jury and proceeding anew does not appear to be for us to consider.

And if a challenge could not at this time be entertained, then it would seem that one of two things must be true: either the defendant must be held to trial by an objectionable and disqualified juror without opportunity to challenge him, or there is a mistrial. And if it is a mistrial, and another trial is necessary, the question arises whether the defendant, in order to preserve his rights, must apply for another trial in a manner and at a time different from the manner and time prescribed by law. By the Statutes of the Territory he is only entitled to apply for a new trial "when a verdict has been rendered against" him. And he is only required to make the application "before judgment is enetred; but the court or judge thereof may for good cause shown allow such application to be made at any time within thirty days after the entry of judgment."

Okla. Session Laws of 1895, p. 202 and 203.

3. Was defendant deprived of a substantial right?

The first part of the last paragraph of Section 2, Article 3, of the Constitution provides:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

The Sixth Amendment recites:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The Fifth Amendment provides:

"No person shall * * * be deprived of life, liberty or property * * * without due process of law."

Section 28 of the act creating the Territory recites:

"That the Constitution and all laws of the United States not locally inapplicable shall, except as modified by this act, have the same force and effect as elsewhere within the United States."

In constructing the Constitution, we look to the history of the times, and examine the state of things when it was framed and adopted.

Rhode Island vs. Massachusetts, 12 Pet. 657, 9 L. ed. 1233.

The history of the times discloses that the Constitution was framed in the light of the common law.

U. S. Wong Kim Ark, 169 U. S. 649, 42 L. ed., 890.

The "jury" mentioned in the Constitution means a common law jury, and "according to the principles of the common law" means the common law of England, and not the common law of the several States, for to undertake to interpret according to the common law of the several States with their modifications would be to make it mean one thing at one place and something different in another.

Traction Co., vs. Hof. 174 U. S. 1, 43 L. ed. 873.

Questions arose from time to time as to the application of the early Amendments and it was decided that they did not restrict the several States in legislation or legal adjudication, which holding now extends to some ten of them.

Brown vs. New Jersey, 175 U. S. 172, 44 L. ed., 119.

It follows as a consequence, although the final conclusion has not been reached without a strong and patriotic opposition, that the respective States, in accordance with their constitutions and laws, may hold one to answer a capital or other infamous crime without presentment by a grand jury; or may try him by a jury of less than twelve men; and the decisions of the courts of last resort of the several States interpreting their own constitutions and laws are binding upon the courts of the United States.

Louisiana vs. Pilsburg, 15 Otto, 278, 26 L. ed., 1090.
Hollinger vs. Davis, 36 U. S. L. ed., 986.

As a consequence to the establishment of these principles, it would seem that no decision of a State Court, and no Federal decision following a State Court in the interpretation of the State constitution or laws, can have application to a case arising under the Constitution and Laws of the United States, or Laws of this Territory.

The adoption of the Constitution superceded the laws of the Confederation, but some of them were continued in force by the Federal Congress, and among them the Ordinance of 1787, guaranteeing to the people of the Northwest Territory that they "Shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury, of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law."

1 U. S. S., 50.

And when finally the Territories were authorized to adopt codes and the proceedings had thereunder were ratified by Congress, it was upon the express condition, "that no party has been or shall be deprived of the right of trial by jury."

18 U. S. S., 27.

The Constitution and Laws of the United States, then, guarantee to one charged with crime in this Territory an impartial trial by a common law jury, and expressly withhold from the Territorial Legislature authority to pass any law conflicting with such right.

Since these provisions of the Constitution particularly relate to criminal trials, it may be that the right may be denied in a civil cause, since we have an instance where a verdict was rendered by nine jurors, under the instructions of the court, no exception however being saved, and the case was affirmed in this court.

Halloway vs. Dunham, et al., 170 U. S., 615, 42 L. ed., 1165.

"All male citizens * * * who have not been convicted of a criminal offense punishable by imprisonment in the penitentiary * * * are and shall be competent persons to serve on all * * * juries within their counties."

Okla. S. Sec. 3093.

"General causes of challenges are * * * a conviction for felony."

Okla. S. Sec. 5183.

A general cause of challenge is "that the juror is disqualified from serving in any case on trial."

Okla. S. Sec. 5182.

What we contend is that this juror was disqualified to serve in any case; that the disqualification was such that defendant is not chargeable with negligence in not having discovered it; that by the false answer of the juror he was deceived and induced to accept him; that at the time of discovering his qualification he was not entitled to challenge him under the Statute; that there was a mistrial, and that the defendant applied for a new trial within the time prescribed by law; and a new trial being refused, the effect is to deny him the right to challenge the juror, or to have a fair trial by an impartial jury.

4. Was the proceeding according to "due process of law? The defendant could not waive a constitutional right.

Thompson vs. Utah, 42 U. S. L. ed., 1061.

And the question arises whether the general disqualification of the juror, appearing at the time it did, presented to the defendant a mere statutory right or privilege which he could and did waive.

It would seem from the authorities that there are some things a defendant may waive even in a capital case. But it appears they are such things as concern him alone, such as are for his benefit, in way of privilege, and not such as are general and apply to all cases wherein persons may be accused of crime, for there is a public interest in the administration of the criminal law.

Hopt vs. Utah, 28 U. S. L. ed., 262.

The defendant is entitled to a public trial by an impartial jury, to be confronted by the witness, and not to be deprived of

his life "without due process of law." He has been tried by a jury of twelve men publicly, and confronted by the witnesses. But the question remains whether he has been tried by an impartial jury and by due process of law. What is meant by due process of law?

That the legislature may alter the common law procedure is not questioned, and to what extent is not the inquiry; but when it has done so, does not the observance of the general statutory provisions become a part of the due process of law guaranteed by the Constitution? Granting that a defendant may waive a statutory right peculiar to him in his position, as the disqualification of a juror to serve in the particular case, if he can do so, does it follow that he may waive that which is a part of the general law of the land and applicable to all men charged with crime, and an essential feature, a moral as well as legal element, of the due process of law? His right to be confronted by the witnesses is constitutional, and he cannot waive it for that reason. But his right to be personally present at all stages of the proceeding is but statutory, and he cannot waive this any more than the other. Such is the holding of this court; also of the Oklahoma Supreme Court.

Hopt vs. Utah, above cited.
Day vs. Territory, 2 Okla., 409.

In the due course of our procedure, the court qualifies the jurors; he did so in this instance. And before the parties are called upon or permitted to interrogate them, they have answered all questions necessary to show their qualifications generally to serve as jurors.

What is due process of law in a state is regulated by the law of the State. And irregularities or errors in the proceedings can only be corrected in the State Courts.

Walker vs. Sauvinet, 92 U. S. 90, 23 L. ed., 678.
Kennard vs. Louisiana, 92 U. S., 480, 23 ed., 478.

This will not apply here. We have a course of procedure prescribed by authority of Congress and which must conform to the laws as well as the Constitution of the United States. And what we claim is, the course prescribed has not been pursued;

that it was the duty of the Territory to place in the jury box men generally qualified as jurors, and, if, on the other hand, the defendant was charged with the duty of inquiring into their qualifications, such inquiry was made and false answers given; and if, without his fault, a disqualified juror was chosen and the fact discovered after it was too late to challenge him, it was the duty of the Court to discharge the jury; and if it may be said that it was the duty of the defendant to take any action, it is answered that he did so as soon as authorized and within the time prescribed by the procedure under which he was tried; and having done all that he was authorized or charged to do, and within the time fixed by law, he should be held blameless for the errors occurring upon his trial; that if the law denied him the right to challenge the juror after testimony as taken and to apply for a new trial before verdict was rendered, he was not afforded a lawful means of trial by an impartial jury, or a qualified jury, the proceeding was not due process of law, and he should have a new trial.

5. Was the juror disqualified?

No exception is taken to the language quoted in the opinion of the Oklahoma Court, that

> "At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the State which enacts it to a conviction and sentence in another State, such conviction and sentence can have no effect by way of penalty, or of personal disability or disqualification, beyond the limits of the State in which the judgment is rendered."

Logan vs. United States, 144 U. S., 263.

But this case seems to arise upon the competency of two witnesses, one convicted in North Carolina and not having been restored to his rights, and the other in Texas and having been pardoned. And the question is one as to competency, with the jury to pass upon the credibility. And the Court appears to hold that Sec. 34 of the Judiciary Act of 1789 does not apply to criminal trials; also that Sec. 858 of the Revised Statutes, and not of those of Texas, govern, and that the national statutes permit such witnesses to testify. We are, however, unable, by the examination of the statutes accessible, to find a law providing that one

who has been convicted of a felony is a competent juror. It rests upon a different principle, and not alone the fact that his conduct and statements which in the box and jury room are not subject to impreachment and the scrutiny of twelve impartial men, as the conduct and testimony of a witness, but upon the broad ground of unfitness, and its inconsistency with the spirit of our institutions, and the rights of a law-abiding public. If one such is competent, then the whole jury may be composed of this class of men; and twelve felons freshly broken out of the penitentiary of one of the States and in hiding here, giving false answers to conceal their flight, would constitute an impartial jury, and a trial before them be due process of law; notwithstanding from the time of making their false answers and the discovery of the fact they would be at the mercy of the prosecuting officer.

But the Oklahoma Statute does not limit the disqualification to a conviction under the laws of the Territory, but generally to "a conviction for felony." On principle and in the nature of things it intends to cover all felons, for it goes to a class found everywhere. Given another interpretation, two men living side by side, having been convicted by the same jury and for similar criminal acts, and sentenced by the same court for the same term, one to the United States penitentiary under the United States laws and the other to the Territorial prison under the Territorial laws, and one would be a qualified juror and the other not; or a man convicted of the most heinous crime, not capital, known to the United States laws would be competent while one convicted of the felony involving least moral turpitude under the Territorial laws would be incompetent. Perhaps the legislature might enact such an unreasonable law, but what we contend is, it has not done so, and that the juror was disqualified; that his disqualification was general; that the public is interested, and the duty to try him by jorurs not felons and false-swearers rests upon the same principle as the duty to see that he was personally present at all stages of the proceeding, and with greater reason; and that, while he may have been able to waive a disqualification to serve in the particular case, as a personal privilege, he did not and could not waive the general disqualification or nullify the general law.

6 Could defendant waive the disqualification?

That there are disqualifications which amount but to ground

of exemption or of challenge is decided by this court.

Kohl vs. Lehlback, 40 U. S. L. ed., 435.

That case presented the question as to whether a statute of the State of New Jersey providing that no exception to a juror on account of his citizenship, or age, or any other legal disability, shall be allowed after he has been sworn, is consistent with the Constitution of that State.

The Court observes that nothing is said as to when the disqualification of the juror, consisting in his being an alien, as alleged, came to the knowledge of the petitioner; and that the truth of his want of citizenship may have been determined in the State Court, and that if the constitutional question had been presented to the State Court and determined adversely to petitioner, this Court saw no reason for declining to be bound, and that no reason appears why the question might not still be presented to the State Court.

As we understand the rule, this court would feel bound by the decision of the State court of last resort in such case whether favorable or not to the petitioner. And the case at bar does not appear to present the constitutionality of the Statutes of Oklahoma, but rather their construction; or perhaps the constitutionality if construed as by the Territorial Court.

The Oklahoma Statutes appear to refer to four classes of persons in connection with the formation of juries.

1. Persons possessing the qualification of electors, etc., and who have not been convicted of felony, are competent on all juries.

2. Persons possessing these qualifications and above the age of sixty years or public officers, etc., are competent unless they excuse themselves.

3. Persons possessing these qualifications but belonging to fire companies are competent, but may be excused by the court. Sec. 3093.

4. Persons possessing these qualifications and not biased or related to the parties in the particular case.

These distinctions do not amount to a classification, but enable easy explanation of the course of procedure.

The first three divisions refer to the general qualifications of jurors for service, and the manner of forming juries. The Court inquires of them. It is done when forming the jury for service in all cases or in the particular case, but usually when no particular litigant is present or in mind. A want of qualification or a disqualification being discovered, the juror is excused without consulting litigants. An exemption being claimed by one of the class numbered 2, he is excused as a matter of legal right it he elects to be. Litigants are not consulted. Those of the class numbered 3 may ask to be excused and the court acts in his discretion.

But in the remaining instance the juror has passed the examination by the court, and, if exempt, has waived the exemption; and if exempt in the discretion of the court has waived it or it has been denied, and is here challenged by one of the parties because objectionable as a juror in the particular case.

Okla. S. Sec. 5182.

It is no doubt true that if a juror has failed to disclose a disqualification for general service as a juror when interrogated by the Court, either party may call attention to it and have him excused. But in the case at bar the juror Harper qualified himself before the Court, and there was no occasion for the parties to inquire of him.

The Statute does not in providing for the formation of juries generally, Sec. 3093, provide that this and that shall be cause for challenge, etc., but that they must possess these qualifications and not be subject to this disqualification in order to be competent.

"Convicted of a criminal offense punishable by imprisonment in the penitentiary," Sec. 3093, and "a conviction for felony," Sec. 5183, enter in, not as referring to time or place, but as to the simple fact as commonly understood, and stand not as a want of qualification, as a neglect to acquire citizenship or the want of sufficient age, but as a *disqaalification*. It is not a want of qualifying attributes, a technical deficiency unassociated with moral delinquency, but a positive disqualification because of criminality.

Now, we find in the opinion in the case of Kohl vs. Lehlback above referred to the expression "positive disqualification" as distinguished from "ground of exemption or of challenge." We find this distinction made and language used in other cases, and are led to believe that it is not meaningless, although we have been unable to find where any court has undertaken specifically to define the distinction between simple ground of challenge and a positive disqualification. The disqualification may be a ground of challenge the same as a lack of qualification; but it seems that if such a distinction exists it must be more than a ground of challenge; that it is not limited to the right of a litigant at his request to have the juror excused, but includes the duty of the court at the behest of the law to exclude him; and that the parties cannot, by waiver or otherwise, enter into a compact, in effect, whereby such a person may lawfully sit, any more than they can make an agreement contrary to law in any other respect.

And since this distinction is so frequently mentioned, and particularly since it is referred to by this Court, we conclude that it must in fact exist, although not, as far as we can discover, clearly set forth, we feel justified in inquiring whether conviction of felony is not a "positive disqualification."

Not to be prolix, but specific, if such thing as a "positive disqualification" exists, it must consist of something set down in the books. To be a female, to be under twenty-one, to be above sixty, to be a minister, to be a public officer, to be a school teacher, to belong to a fire company, to be an attorney, to be licensed to sell liquor, to not be an elector, to be of unsound mind; which of these is a positive disqualification? Only that of insanity or idiocy can compare with criminality in unfitting one for jury service. And we think, too, that it is incompatible with the spirit of our institutions that one charged with crime, presumed to be innocent, although he may, and if guilty in fact would at least sometimes prefer it, shall be tried by a jury of felons; and that the interests of the public demand that he shall be tried by "good and lawful men."

Respectfully,

J. W. JOHNSON,
STILWELL H. RUSSEL,
C. B. AMES,
H. H. HOWARD,

21210

In The
Supreme Court of the United States,
October Term, 1902.

THOMAS P. QUEENAN,
Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA,
Defendant in Error.
} NO. 246

Error to the Supreme Court
OF THE
Territory of Oklahoma.

SUPPLEMENTAL BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT.

Under permission of the court obtained, we submit, as supplemental to our original brief, the following, yet in doing so we have not the benefit of the supplemental brief and authorities on behalf of defendant in error.

To our assignment, pages 1, 2, and 3 of our original we add:

First: That the question before this honorable court for its determination, is not the sanity or insanity of the plaintiff in error, as it is, was he deprived by the ruling of the trial court of competent evidence that would tend to support his plea of insanity.

Second: It is manifest from the colloquy between the court and counsel, (page 24 P. R.), that the issue was, whether an

opinion formed since the facts were observed, and entertained at the time of the trial, was competent evidence.

Third: The defendant in error in his brief; page 2, upon this question contends:

> "That it is possible for the trial court to have excluded the evidence on other grounds than the one stated by us."

This statement is not supported by the record. The direct question was put by the court to the counsel,—if they were asking for the opinion of the witness at the time of the trial, etc. The court held this evidence to be incompetent. The rulingK of the court forestalled further action in the premises or further inquiry.

Again the contention by the defendant in error that the witness had not shown a sufficient acquaintance with the plaintiff in error; and that the facts upon which the opinion was called for were insufficient, is not tenable.

First: For the reason that it is the competency of the evidence and not its weight that is under consideration; (second) The OBJECTION DID NOT GO TO THE FACTS STATED BY THE WITNESS, or that the facts STATED BY HIM WERE INSUFFICIENT UPON WHICH TO BASE AN OPINION. No such objection was made or was in the mind of the court when the ruling was made. The facts observed were held competent, (P. R. 24)

II.

To our second we submit the following:

First: The question of guilt depended solely upon the condition of the mind at the time the act was committed. Only one instruction was applicable. If the wrongfulness of the act at the time of its commission was understood he was guilty, otherwise he was not.

Second: Where the instructions are contradictory or inconsistent with each other; or if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or

uncertainty as to the law applicable, then the judgment should be reversed.

Sommers vs. Pamphrey, 24 Ind. 241.
Kirkland vs. State, 43 Ind. 154.

Third: An objectionable instruction cannot be corrected by other instructions which are not objectionable, nor can an erroneous instruction be corrected by one not erroneous.

Guetig vs. State, 63 Ind. 282.
65 Calf. 129.

Fourth: It is important that the deliberations of the jury be not influenced by an improper instruction.

Shaw vs. The People, 81 Ill., 151.

Fifth: The language of the instructions ought to be unambiguous, directand comprehensible by persons not educated in the law,—such as the men addressed will understand.

Bish. Crim. Pro., Vol 1, 3 Ed., Sec. 980.

And authorities cited under reference 7. And will be treated as erroneous if liable practically to mislead.

It is admitted by defendant in error, (page 6 of brief), that the instruction complained of may require a higher Standard of insanity than is required by the statute of Oklahoma, and that they go to opposite extremes, and while the last four lines of the fifth instruction are prejudical they should be considered as a whole and thus considered there was no error.

He does not deny but what they are confusing distinct propositions, contradictory and inconsistent, and from his admissions, if we keep the rule in view, it is impossible to relieve them of ambiguity so as not to confuse and mislead. The men addressed should understand them, otherwise they are erroneous.

An analysis of the fifth instruction, means that if he knew and understood that it was wrong and if he was able to know and understand the consequences of the act, he was guilty of murder; or, as an affirmative proposition, if the jury should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the conse-

quences of such act, then they should find the defendant not guilty. A condition not warranted by the law and burdensome before he could be acquitted.

Here we have two opposite instructions seeking to define the mind's responsibility. Which one was the jury likely to adopt? If either was objectionable the inquiry ends and by the rule the judgment should be reversed.

Ignorance of the act as being wrongful and not an ignorance of the mere act itself or its consequences, is the legal test. A man could know that he was taking life and have capacity enough to understand its physical nature, and at the same time be unconscious that he was committing a crime.

U. Bigelow vs. Ins. Co., 3rd Otto 228.

In Winston vs. U. S., Vol. 172, page 313, the trial court enlarged upon the law by instructing that the act of Congress, providing in cases of murder that the jury could add to their verdict "without capital punishment," was intended to apply to cases where there were palliating or mitigating circumstances. This was held to be an enlargement upon the statute.

In the case at bar the statutory test applies to a mental incapacity of the wrongfulness of the act at the time the act was committed, which is not to be destroyed or neutralized by a capacity manifested subsequent to the act.

Sec. 1852 Okla. Stat. of 1893.

On pages 338 to 341 of the transcript it is shown that plaintiff in error, immediately upon committing the act, leaped through the window to the pavement below, carrying with him glass, sash and all in his fall, and which seriously disabled him.

Standard authors upon insanity teach us that great shocks produce insanity, and per contra, great shocks restore the mental balance, and we respectfully submit that the shock received could have restored his mental equilibrium and make him understand what he had done, even though he did not know at the time of the act that he had committed a wrong.

There was no motive for the crime except that shown by his mental condition. His mental condition was frequently the sub-

ject of discussion between his wife and members of his family, P. R. 21. They were a very affectionate couple, and a disturbance between them was never heard of, P. R. 14. He was a great sufferer from physical disease and for the past few months prior to the homicide complained of his head as well. The physical disease and its effect upon the system, being a chronic necrosis of the bone and a disturber of the nerve centers, Tr. 559 to 564.

From the foregoing we deduce the following—that no man ever harmed the woman he loved when sane. Physical disease is one of the primary and producing causes of insanity.

Immediately upon his fall to the ground the doctor and others got to him and in answer to their questions said go to his wife and baby; he had killed them, Tr. 337. The child was unharmed, yet in his hallucination he thought he had killed it as well. He imagined that he had shot it when nothing of the kind had happened. Suffering from a perversion of the disease, he entertained a false idea, a wrong impression. Insane people can have memories. Insanity is a condition of a diseased brain, which manifests itself by disordered or perverted sensations or feelings or by disordered or perverted ideas, actions or impulses.

After plaintiff in error recovered from his fall, by the language used, he seemed to know that he was not hurt himself while in fact he was, he seemed to know that he had killed his wife, and the fact was that he had. These matters are referred to, to direct attention to the fact that the instructions were harmful and enabled the jury to find that as he comprehended after the fall the consequences of his act he necessarily understood the wrongfulness of it at the time of its commission.

This issue was sharply drawn in the trial court by the special instructions asked and refused, Brief page 7.

The Eighth instruction, P. R. page 26, were not excepted to, yet we beg the pardon of the court if we suggest that if stripped of every other objection, it is seriously objectionable in limiting and restricting the jury to matters "against his interest" in determining the condition of his mind at the time of the act. We are taught that declarations, acts and conversations, if res gestæ, whether for or against, are admissible. But the particular

vice in the instruction referred to is that the attention of the jury was thereby called to the fact that he was conscious of the consequences of his act as shown in his declarations to the physician, and understanding the consequences it necessarily embraced the capacity to have known that the act was wrongful—in opposition to the statute of Oklahoma which says that if he was incapable of knowing its wrongfulness merely he was excusable.

III.

We desire to add to our third assignment, which begins at page nine of the brief, the following:

Was the jury that tried plaintiff in error a legally constituted jury?

The court will pardon our insistence in this matter and permit us to direct its attention to the fact that in so far as our investigations have permitted us we have been unable to find a case like the one at bar on this point.

The disqualification complained of is one directly associated with criminality, and unlike the causes referred to in Kohl vs. Lehlback, 160 U. S., 432, and the case in Vol. 187, page 159.

The mischief in this case is that a person was put on the jury who was in fact an outlaw, and neither by the action of waiver on the part of the defendant or acquiesence on the part of the court could he be qualified.

It has been held by good authority that the grand jury with one or more unqualified members is an illegally constituted body, and its presentments void.

Dovey vs. Hobson, 6 Taunton, 460.
U. S. vs. Wilson McLean, 610.
Commonwealth vs. Parker, 2 Pickering, 550.
Commonwealth vs. Doyle, 17 Ohio, 225.

In Commonwealth vs. Doyle the court says: "No objection can come too late which discloses the fact that a person has been put to answer a crime in a mode violating his legal and constitutional rights. The doctrine of waiver has nothing to do with criminal prosecutions. No person can be put upon his defense on the charge of crime or be convicted of crime except in the

exact mode prescribed by law, and whenever it shall be made manifest in the progress of a criminal prosecution that the legal rights of a person charged have been violated the court will permit the accused to have the benefit of the error. * * * It must be admitted that the juror was incompetent if the accused had spoken in time. How can his silence make him competent when he was not so by law? It is not the accused that makes the juror, but the statute."

We respectfully ask, can an accused, by his consent or will, constitute a juror?

What was the remedy?

Section 5177 Okla. Stat., says the court for good cause shown may permit a juror to be challenged after he is sworn to try the cause, *but not after the testimony has been partially heard. If this statute is permitted to mean what it says*, then we ask what right had the defendant to challenge a juror when his disqualification was suggested? If he had not the right under the statute to move his disqualification, how did his silence or his lack of legal right to challenge waive the disqualification?

The court should have declared a mistrial.

In the circumstances confronting the court it was the duty of the court to have discharged the jury and declared a mistrial. Under our view of the case the juror being a nullity jeopardy had not attached. "The jeopardy spoken of in the Fifth amendment of the constitution can be interpreted to mean nothing short of the acquittal or conviction of the person. This was the meaning affixed to the expression by the common law."

4 Wash. Cir. Ct. 410.

In Com. vs. McCormick, 130 Mass., 62, the court says:

"Whenever the case cannot be proceeded with by reason of some physical or moral necessity arising from no fault or neglect of the government the trial may be stopped and defendant afterward tried upon the same indictment. Such interference is necessary to prevent great injustice to one side or the other. The power is to be used alike for the protection of the prisoner in his right to an impartial trial."

In the case of Simmons vs. the U. S., Vol. 142 U. S. 148, in the opinion delivered by Mr. Justice Gray, it is held—to be the duty of the court to have declared a mistrial because of the disqualification of one of the jurors discovered during the trial. In that case the cause simply effected the bias of the juror, and we submit that the case at bar presents a much greater difficulty for the jury to act with the independence and freedom requisite to a fair and impartial trial.

We respectfully invite the careful attention of this court to that opinion and the authorities there cited, and also to the opinion in U. S. vs. Morris, 1 Curtis C. C. 23. It seems to us that the views announced by Mr. Justice Gray and those of Mr. Justice Curtis upon the question we here present are unanswerable.

A discharge of the juror was the right of the court and in any matter where the right exists duty is apparent. The accused was entitled to it. It was the duty of the court to direct the remedy and persue it. If we are answered that the statute of Oklahoma prevented such action, then we reply that the defendant was thereby prevented. Be that as it may, the way was open to the trial court whether the defendant consented or not, because under the law it was the duty of the court to see that a fair and impartial trial as well as a legally constituted jury was impaneled.

We have been unable to find any decision from this court calling into question those referred to and now presented in the case at bar.

We respectfully ask, how can there be an impartial trial or an impartial jury with one member thereof a convict? If one member is a felon and the jury is legally constituted then upon the same principle twelve felons could have escaped the penitentiary and come into this new country, and for fear of disclosing their identity, qualify in form and thus make themselves by force of perjury citizens rehabilitated in the full garb of honest and legal elligibility, without power in the courts to remedy the wrong.

The matters presented in our original brief supplemented by those now sumbitted, we hope will receive consideration and

the erorrs appearing will warrant a reversal and remanding of this cause.

Respectfully submitted,

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C. B. AMES,
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For Plaintiff in Error, Thomas P. Queenan.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1902.

THOMAS P. QUEENAN, Plaintiff in Error, vs. TERRITORY OF OKLAHOMA, Defendant in Error.	NO. 246.

Error to the Supreme Court of the Territory of Oklahoma.

BRIEF OF DEFENDANT IN ERROR.

The first point raised by plaintiff in error goes to the admissibility of certain evidence. [P. R. p. 24.] The

witness, John H. Beatty, was asked if certain acts of the accused, which he had previously related, had made any impression upon his mind relative to the sanity or insanity of the accused. He replied that they had not done so at the time of their occurrence. He was then asked whether these facts, when recalled, aroused in his mind, at the time of his examination, any impression or opinion of the sanity or insanity of the defendant at the time that the circumstances occurred.

ADMISSIBILITY OF CERTAIN EVIDENCE.

To this question the territory objected on the ground that it was incompetent. And the court, in holding it incompetent, used the following language "I think that it is incompetent for the purpose of this trial." And so ruled it out. Upon this record counsel have reared an argument to the effect that since they were seeking to elicit an opinion formed subsequent to the happening of the events, an exclusion of this testimony must have been because the opinion was formed subsequent to the circumstances upon which it must have been based. The court will of course immediately notice that this is not so much an erroneous conclusion as it is an incomplete one. It is possible for the trial court to have excluded the answer to this question on other grounds than the one assigned by counsel.

The fundamental rule is that facts alone, not opinions or conclusions are admissible. To this rule there exists the exception that, under proper circumstances, the opinions of non-experts upon the question of sanity are admissible; but they are not admitted, except when tested

and when they pass the test of all the established rules of evidence, applicable generally.

State vs. Pike, 49 N. H. 401.

They are not admitted when they violate the established rules of evidence relating to relevancy or pertinency.

Cochran vs. Little, 18 Atl. 701.

They are not admissible when they violate the doctrines of relevency.

State vs. Pike, Supra.
Also Sullivan vs. Hugley, 32 Ga. 316.

They are not admitted when, from the facts detailed, it is as possible for the jury to arrive at an opinion as it was for the witness.

Wharton Criminal Evidence, Sec. 459 and cases cited.

They are not admitted, when the witness has by his previous testimony shown his incompetency to form an opinion. They are not admitted when the facts upon which the opinion is formed are not given, or when the facts disclosed such a state of affairs as would prohibit the arrival at more than one opinion.

From the record, who can pick out what one or more objections existed in the mind of the court to the introduction of this testimony? Counsel have picked out from the number of all possible reasons which might have been operative in causing the exclusion of this testimony the one, and that arbitrarily, which they deemed to be unsound. We are led from the record to infer what was the ground taken by the trial court in rejecting the offer of testimony. When neither the ground of the objection nor

the ground upon which the objection was sustained was set forth, why, then, can counsel be permitted to argue that the offer was rejected because of a reason illegally founded; when, from anything that the record discloses, we are justified in applying any one of several reasons, any one of which might be deemed sufficient for the rejection.

It is a ground rule of appellate practice that error is is never presumed.

Humphrey vs. Collins 23 Kansas 549.

Admitting that the trial court rejected this testimony upon the ground alleged by counsel and admitting that this ground would not form a sufficient reason for its rejection, still the rule of law is that if the evidence thus rejected for an improper reason is for any other reason known to the law inadmissible, no prejudicial error has been committed.

Enc. Pleading and Practice, Vol. 2, p. 372
and cases cited.

"If the judgement, decision, or ruling of the inferior tribunal is correct on any legal ground, it will be affirmed although the reasons assigned by the court below are erroneous."

Enc. Pleading and Practice, Supra.

We believe no error to have been committed by the rejection of this testimony for the reason that the record discloses that the witness had not such an intimate knowledge of the defendent as would entitle him to express an opinion. When the witness was asked, (P. R. Page 22) if he knew the defendent and how intimately he had known him, he replied, "quite well, I had him do my barber work for some years. Q. What do you say; are

you acquainted with his disposition as to kindliness and affection and amiability or otherwise? A. I used to be, yes sir." It seems to us needless to cite authorities to the point that in order for the opinions of non experts to be admissible, they should disclose that their association with the defendent has been such as to have enabled them to closely examine his conduct, manner and appearance and so close consecutively as to have enabled them to note any change in the manner or demeanor of the defendant. The authorities very generally hold in addition that a wide discretion is vested in the trial court to determine whether, from the evidence disclosed by the witness, he has shown that degree of intimitate acquaintenship which wauld enable the court to receive his opinion, with reference to sanity or insanity. Upon this point, we desire to cite,

Coller vs. State, 75 Ind. 511.
Southerland vs. Hawkins, 56 Ind. 349.
Commonwealth vs. Sturtivant, 117 Mass. 122 at p-137.
Unnes vs. Perry, 113 Mass. 274, at p-276.

Upon the ground, then, that the witness had not shown that degree of acquaintance with the defendant which is required, and upon the ground that the facts upon which the opinion was to be based were insufficient, the court did not abuse the discretion vested in it, and properly rejected the testimony. We submit there was no error here.

THE FIFTH CHARGE.

Plaintiff in error raises a question of the legal correctness of the fifth charge of the court found on page 25

of the printed record. We do not believe that the court will find that this instruction taken as a whole was prejudicial to the defendant. It is a familiar rule of law that it is improper to take a sentence or three or four lines out of the body of an instruction and to rear thereupon an argument. Counsel have done this. With reference to its legality the instruction must stand or fall as a unit. If the last four lines of the instruction were prejudicial to defendent, what immediately preceded went to the opposite extreme in being favorable to him. Under the language used:

"If one has sufficient mind and understanding to know right from wrong regarding the particular act and is able to comprehend and understand the consequences of such act, the law presumes him sane and holds him responsible for such acts; and in this connection, however if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment and at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequences of such an act, then and in that event it will be your duty to find defendant guilty of murder as charged in the indictment."

And so, while the language quoted by plaintiff in error and complained of by him, may require a higher standard of sanity than is prescribed by our statute, in that that language seemed to require that he be unconscious of the consequences of his act as well as the wrongfulnes of it, before he can be acquitted; still the language immediately preceeding required him to be *conscious* of both the consequences and the wrongfulness of the act before he could be *convicted;* and to this language nobody but the

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territory could object, as it is certainly favorable to the defendant. And this latter is used in the form of a concrete illustration.

It is of course notorious that ordinary men will seize upon the idea conveyed by a concrete illustration, when the same idea stated abstractly would pass them by. Jurors as they listen to instructions delivered to them orally are not able to pick flaws and find distinctions and maintain the subtle arguments that counsel are able to do when sitting down with the written instructions before them, and the necessity of finding errors present to their mind.

And upon this instruction to answer sophistry by sophistry, the clause "was not able to comprehend and understand the consequences of such act" does not necessarily convey any other or further idea from the clause "that he was not able to know that the act of taking her life was wrongful." We believe we argue logically when we say that one who is unable to comprehend *one* of the consequences of an act, is unable to comprehend "*the consequences*" of an act. One of the consequences resulting from homicide is a moral injury inflcted. If the defendent did not know right from wrong, he did not know that he had committed a moral injury—did not realize *one* of the consequences of his act; it follows then that he could not be able, not knowing right from wrong in this instance, to understand the *consequences* of his act. The instructions can not be taken to mean, because illogical, that in order to fail to understand and comprehend the consequences of his act, that he must fail to understand and

comprehend *all* of the consequences universally; so that under this view, while the last four lines, upon which part of then instruction counsel base their ground for reversal, might be taken to be, upon careful examination, ambigious, it is not necessarily erroneous, and that ambiguity is cured by the language, used in the instruction immediately preceding.

That this instruction is in harmony with the adjudications of the Supreme Court of this Territory, we desire to quote a brief portion from the opinion in the case of Maas vs. Territory 10th Oklahoma, at page 717, where the very point argued by council is considered. "Under this section of the statute (section 1852 of the crimes act Oklahoma) cited by counsel in their brief on page "

"The test of responsibility is fixed at the point where one has the mental capacity to know that the act is wrong, and if one has sufficient capacity to distinguish between right and wrong as applied to the particular act, *and who understands the nature and consequences of such act*, he is responsible for the same; and it is immaterial what standard scientific men may fix, or by what rules the medical profession determines that one is a lunatic or insane, he is in law insane or a lunatic, or of unsound mind, or temporarily or partially deprived of reason to such an extent as will excuse him from punishment, only when he has not the capacity to know the wrongfulness of an act; this also embraces capacity to understand the nature and consequences of the same."

We believe with counsel that it does not neccessarily follow that the capacity to understand the nature and consequences of an act is necessarily include in the capacity to distinguish right from wrong, but do not agree with them to the extent that it is also necessarily excluded, but

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believe that the language used by the court does not necessarily convey the idea of a more stringent test than the ability to comprehend right and wrong, except in a few exceptional cases; for instance in the so called cases of partial insanity or fixed monomania or in cases where crimes have been committed under the influence of a so called "irresistible power."

Taking the instruction as a whole, bearing in mind what the effect of it, all, would leave upon the jury, and in view of the construction heretofore placed upon our statute by our Supreme Court, we believe no prejudicial error to have been committed.

JURORS' DISQUALIFICATION.

Plaintiff in error for his third point claims that he was prejudiced because of the fact that one of the jurors, J. F. Harper, who served during the trial and verdict was disqualified, having been convicted of grand larceny in the State of Nebraska. The record however, printed record page 13, shows that after evidence had been introduced, counsel on both sides had been informed of the facts of the alleged disqualification and were given an opportunity by the court to present the matter to the court and to exercise whatever rights they possessed by way of challenge or otherwise. The record discloses that the attorneys for plaintiff in error chose to sit silent. Commenting upon this action or rather failure to act upon the part of counsel, the Supreme Court of the Territory quotes the following language from Enc. of Pleading and Practice, volume 12, page 557, found on printed record p. 159:

"If rumors affecting the conduct of a juror are of so serious a character as to require a dismissal of the juror and the impanelling of another, it is incumbent upon counsel to move in the matter upon information of the prevalence of the rumor. They cannot sit silently by and speculate upon the result."

Further the court quotes from Thompson on Trials, section 114:

"A known cause of challenge is always waived by witholding it or raising it as an objection after verdict since such a practice is incompatible with the good faith and fair dealing which should characterize the administration of justice. For counsel to sit in silence when the court is embarrassed in the process of panelling a juror, declining to take any action on the suggestions of the court and answering that they have nothing to say and then raising the proper objection in case the verdict goes against them, is a trifling with the court and the administration of justice which will not be tolerated on a trial of the gravest offences."

In reply to this, counsel raises the query whether the juror was subject to challenge at the time and cite in support of their contention (plaintiff in error's brief, page 9) sections 5167 and 5177 of the Statutes of Oklahoma.

In Hollingsworth vs. Duane, C. C. 147, it is said:

"If a party comes to set aside a verdict on the ground of a disqualified juror, he must make a very special case indeed. He must show from the nature of it, that ordinary diligence could not have affected the discovery; that he was surprised; or that after due inquiry and pains, he had missed or been misled as to the fact."

And further in Brown vs. Jacobs, 22 Fed. at page 243:

"But even if ignorance were an excuse to a party, in all cases, for not challenging a jury for a cause *propter delictum* or *propter affectum*, which is by no means clear in

Tennessee, there must be shown in addition that the party has been injured by reason of that particular juror taking part in the verdict. That he was not qualified is not sufficient; it must be further shown that the verdict was vitiated by reason of the juror's want of proper legal qualifications."

Citing Hill vs. Yates, 12 East 229.

Thompson and M. Jur. Sec. 295 et nota.

Plaintiff in error's motion for new trial and the affidavits in support and the record generally discloses that there was no due diligence; no effort made to discover the disqualification; no surprise and no injury to the appellant because of the disqualification. These affidavits occur in Printed Record pp. 36 and 37, and will be found not to contain even allegations of surprise or prejudice. Counsel say that the reason that they did not raise the objection to the juror's disqualification at the time of its discovery was because under the section of the Oklahoma Statutes, 5175, cited by them, Brief page 9, they could not challenge the juror after the testimony had been partially heard. The above statutes (and no other on our books) makes no distinction between challenges *propter defectum* or *affectum* and challenges *propter delictum*, but says:

"That the court for good cause shown may permit a juror to be challenged after he is shown to try the cause, but not after the testimony has been partially heard."

The "good cause" for challenge is in immediately following sections defined:

"5181—A challenge for cause may be taken either by the Territory or the defendant.

5182—It is an objection to a particular juror and is either:

First. General, that the juror is disqualified from serving in any case on trial; or

Second. Particular, that he is disqualifid from serving in the case on trial.

5183—General causes of challenge are:

First. A conviction for felony.

Second. A want of any of the qualifications, etc.

Third. Unsoundness of mind, etc."

All of the general causes for challenge are included by the legislature in the above statutory definitions; no distinction is made between the various sorts; "conviction for felony" is not placed in a specially privileged class; but all these cases, or any of them, must be brought to the attention of the court before testimony has been heard, and must then be "upon good cause shown." So far as the legislature of this Territory is capable of dealing with this subject, it has unmistakably expressed itself. If counsel rely upon these statutes as ground for failing to challenge, when the opportunity first arose; if they attempt to excuse themselves for not challenging before verdict under a statute which says that challenges must be interposed before *any part* of the testimony has been heard, where can they find their justification for waiting with the same sort of an objection until after *all the evidence* has been heard and the verdict has been returned? They admit (Brief p .) that it is not ground for challenge before verdict; have they shown any authority of statute for challenge after verdict, either by motion for new trial or otherwise? We believe we have shown elsewhere in this brief that the right of accused to be tried by jurors possessed of certain qualifications is not a constitutional but a statutory right; and it follows

that if he does not take advantage of a statutory right in the manner laid down by the statute, he must be taken to have waived it.

The court might consider that, in some instances, this would work a hardship upon the accused. The bias, criminality, insanity of a juror might not be discovered by the accused acting with diligence and in good faith, until after evidence had been introduced; and by reason of the statute, he would then be too late to avail himself of the disqualification. We submit that no consideration of this sort is involved in any question presented in this case; because the defendant never did call upon the trial court to rule upon a challenge, to this juror. But, should he have entered his challenge when he first discovered the disqualification, and the court had disallowed it, because he was too late, we are not sure that the defendant would have been prejudiced, any more than if the Legislature should have repealed the above quoted sections, before this crime had been committed. A right that has been given by a statute may be taken away or regulated by a statute.

That our statute is but confirmatory of the common law, so far as appellant's right to complain after verdict is concerned. See

4th Black (Cooley, 3d Edit.) p. 350.
2 Hall P. C. 293.
Bac. Abridg. "Juries." 365-366.

Upon this point we desire to cite the following cases:

Brewer vs. Jacobs, 22 Federal Report 217, at p. 236 etc. See p. 241.
Fisher vs. Yoder, 53d Federal Report 565.

State vs. Ready 44th Kan. 700.
State vs. Jackson 27th Kan. 581.
Cox vs. People 80th New York, 500.
Stewart case 15th Ohio State 159.
Dilworth vs. Commonwealth, 12 Gratt. (Va.) 689.
Bristow case 12 Gratt. 646-647.
Childres vs. Ford, 18th Miss. 25.
People vs. Stewart 64 Cal. 60.

Under the common law procedure, the right to peremptory challenge or challenge for cause was considered as waived if not interposed at the proper time and the disqualification is waived if the juror was not so challenged. So that under the common law if the objection that the juror is disqualified is not interposed at trial it is waived and the person disqualified may constitute a juror of twelve.

Coke on Littleton, volume 1, section 234, pages 155a to 158b.
Chelsea Waterworks Company case 10th Exch. 731.
Hill vs. Yates, quoted in Cole vs. Lehlback, 160 U. S. 93.
Hollingworth vs. Duane, Federal Case No. 6618.

"When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict."

Wassum vs. Feeney, 121 Mass. 93.
Jeffrey vs. Randal, 14 Mass. 205.
Woodward vs. Dean, 113 Mass. 297.
State vs. Scott 56 Mich. 154; 22 N. W. 274.
Leper case 29 Texas Appeals 63.
Lane case 29 Texas Appeals, 310.
May vs. State 37th S. W., 721.
People vs. Mortier, 58 Cal. 262.
Garrett vs. Weinberg, 31 S. E., 341; overruled by

Mew vs. Charleston, 32 S. E., 828. (So. Car.)
State vs. Hartley, 40 Pac. (Nev.) 374.
Pickett case 39 L. R. A. 302 (Iowa.)
State vs. Robinson, 54 S. C. 147.
Powers case 10th Oregon, 145; 45 Am. Reports, 138.

But plaintiff in error contends that the disqualification of the juror, Harper, because of his conviction of a felony is such a disqualification as could not be waived by him; that his right to a properly qualified juror is a personal right and privilege and must be given to every one tried in capital cases; that this is a constitutional right and cannot be waived. In answer to this we have to say that a criminal has no vested constitutional right in the practice and procedure under which he is to be tried.

Maxwell vs. Dow, 20th Supreme Court Reports, 449.
Iowa Cen. R. R. vs. Iowa, 160 U. S. 389.
Hornbuckle vs. Toombs, 18th Wallace, 648.
Hershfield vs. Griffith, 18th Wallace, 657.
Davis vs. Billand, 18th Wallace, 659.
Miles vs. United States, 103 U. S., 304.

The case of Reynolds vs. United States, 98 U. S. 145, holds that the number of grand jurors necessary to find an indictment in the Territory must be determined by the territorial laws and not the acts of Congress.

The case of Clinton vs. Englebrecht, 13th Wallace, 434, holds that the laws of the Territorial Legislature providing mode and manner of impanelling grand and petit jurors must govern in the courts of the Territory. To the same effect and holding is the case of Thiede vs. Utah, 159 U. S., 514. All of which cases determine that the Territorial Legislature has the power to fix such

qualifications to a trial juror as it may see proper, and may omit or add to all or any of the common law qualifications. It is not contended that the Territorial Legislature has the power to proyide for trial by a jury of a less number than twelve, but this point is not involved in this case, and for that reason the case of Thompson vs. State of Utah, 190 U. S. 343, does not in any way conflict with or overrule the cases herein before cited. The trial must be before twelve men, for the same reason that it must be before the court and vice versa, but the qualifications of the individuals composing the court and the jury is a matter left to the discretion of the Terrttorial Legislature. That the due process of law referred to and mentioned in the constitution does not apply to matters of practice and procedure either under the State or Territorial courts, will be found to be unquestionable from the cases above cited. If the qualification of jurors, the individuals to compose the jury, is a proper subject of legislation, practice and procedure in the Territory, of all cases in such court, it is so by virtue of the constitution and the laws of Congress. The fifth amendment to the Constitution of the United States has the same relation to the Territory that the fourteenth amendment has to the States. The following cases have decided beyond question that the fourteenth amendment does not operate to control the practice and procedure of State courts:

Mun vs. Louisiana, 94 U. S., 114.
Kelly vs. Pittsburg, 104 U. S., 78.
Nashville R. R. Co. vs. Alabama, 128 U. S., 96.
Hallinger vs. Davis, 146 U. S., 314.
U. S. vs. Cruickshank, 92 U. S., 542.
Maxwell vs. Dow, 20th Supreme Court Reports, 449.
Scott vs. Toledo, 36 Fed., 385.

In matters in which the citizens of the State are protected under the fourteenth amendment of the constitution, the citizens of the Territory are protected under the fifth and sixth amendments with this further provision, that the citizens of the State may change their organic law and may provide that a less number than twelve individuals may compose a jury in a capital case. The Congress of the United States, it appears, cannot do this, but it can and does provide the mode and manner of the selection of such jury.

If the Territorial Legislature has the power to fix and establish the qualifications of the individuals that are to constitute the jury in a capital case, then it is that this qualification is not established by the constitution and is not a constitutional or vested right and hence it is a right that may be waived.

It is true that the common law that fixed the number of jurors also fixed the qualifications of the individuals composing the jury, but these qualifications, as the cases herein cited must show, have at all times been subject to change by the Legislature. The qualifications of a juror according to the common law, at the time of the adoption of the amendment to the constitution referred to are not the qualifications recognized by the Congress of the United States or the courts of the United States. One of these qualifications was that a juror should be a free man and should have an income equal to at least forty pounds per annum; another qualification was that if the party proceeded against was a foreigner, he was entitled to a certain number of men of his nationality, on his jury.

These qualifications are certainly not now recognized. And, again, the formation of the juror is as much within the letter or purview of the constitution as are the qualifications. Under the common law the sheriff is required to select a certain number of men for a term of court, these men to be selected out of the proper county in which the court was held, a list with one name under the other of all persons summoned, this list called the "array or jury poll." In performing this duty the sheriff was to make his own selection; this is a qualification of the common law for jury service and yet is not practiced or recognized, but is subject to regulation by the Congress or the Territorial Legislature. The number of challenges, mode and method of challenge, are well defined in the common law but are certainly not controlling in our courts. There are many grounds for challenge and disqualification under the common law that are entirely at variance with our institutions. See upon this subject:

Coke vs. Littleton, Vol. 1, Sec. 234, page 155a to 158a.
Sharswood's Blackstone, Vol. 2, pages 352, 353 and 354.

The uniform practice in federal courts for more than fifty years has been to impanel jurors in capital cases with qualifications different from those prescribed by the common law. See section 800, chapter 15, revised statutes of the United States. The qualifications of jurors in the Indian Territory vary materially from the common law qualifications. See Indian Territory Statutes; 1899 (Carter) Section 1578, Chapter 40 and Section 8, United States Statutes at large, Volume 25, page 783. If the qualifications of jurors as fixed by the common law do not control

under the practice in the federal courts, and if Congress has acted upon a contrary rule for fifty years. then the law is as declared by Congress and practiced by the courts under such acts and laws; and if the constitutional guarantee of a trial by jury does not refer to the qualification, and as we have seen is not binding on Congress and federal courts so as to require twelve men possessing all of the common law qualifications, then it is not binding on the Territorial courts, they being creatures of the same Congress.

WAS THE JUROR DISQUALIFIED?

If Harper is disqualified at all, it is by reason of the peculiar provisions of our statutes and not by reason of the common law, and by reason of the following:

" and who have not been convicted of a criminal offense punishable by imprisonment in the penitentiary."

Ok. Stat. 1893, Sec. 3096.

"General causes for challenges are: First, a conviction of felony."

Ok. Stat. 1893, Sec. 5183.

"A felony is a crime which is, or may be, punishable with death, or by imprisonment in the Territorial prison."

Ok. Stat. 1893, Sec. 1841.

All criminal offenses not so punishable are misdemeanors, must be defined by statute and are not punishable by the common law.

It is reasonable to assume that when the law of this Territory speaks of "the Territorial prison," as in Sec. 1841, supra, it means the prison of Oklahoma Territory. It is likewise reasonable to infer that when it speaks gen-

erally of a "felony," as in Sec. 5183, supra, a felony as created by our Territorial statutes is intended, and not a common law felony. Now, can it not as reasonably and certainly be contended that when, in Sec. 3093, supra, the statutes of this Territory refer to "the penitentiary," the "Territorial prison," the penitentiary of this Territory is intended, and no other?

It appears by the record p. 669 that Harper was convicted in the State of Nebraska of the larceny of $66.00, (grand larceny), and sentenced to the penitentiary of that State; he has not been guilty of any offense punishable by the laws of this Territory.

By the laws of the States of Nebraska, Kansas and Vermont and the Territory of New Mexico, larceny is divided into petit and grand; in each of these jurisdictions petit larceny is a misdemeanor, grand larceny a felony. The statutes of each defining felony and misdemeanor are practically identical with those of Oklahoma. The amount necessary to constitute larceny a felony or make punishable by imprisonment in a penitentiary or State prison, varies in the several States and Territories. In this Territory it must be more than $20.00; in New Mexico more than $100.00; and in Vermont only more than $7.00.

Laws New Mexico (1884) Secs. 742-743.
Statutes of Vermont (1894) Secs. 4939, 4940, 5166.

From this it may be easily deduced, that if Harper had committed a like offense (i. e. stolen $66.00) in New Mexico instead of Nebraska, he would not have been disqualified as a juror in Oklahoma, because he would not have been convicted of a criminal offense punishable by

imprisonment in the penitentiary. On the other hand, if he had been convicted in Vermont of stealing say only $10.00, under the theory of the defense, he would be disqualified, although the theft of a like amount in Oklahoma would not have affected his qualification. Tested by the provisions of the Oklahoma Statutes the rule touching the qualification of jurors would be uniform, as it should be; otherwise there would be practically as many rules as there are States and Territories.

Much is said in plaintiff's brief about the disqualification of the juror, Harper, being a "positive or absolute disqualification;" and about it's being a higher power of disqualification than others, and for that reason not to be waived. No cases are cited by them in support of this distinction.

We take the position that there is no great, greater, greatest disqualification; at any rate, that no such distinction, if it should be found to exist, would avail appellant in this case, raising the objection, as he does, for the first time after verdict.

"Generally an objection to a juror for incompetency *from any cause* is waived if not made before verdict. The disqualification of a juror has, however, been frequently made the ground of an application for a new trial or other relief after verdict, and the courts have not been in unison in their action on such applications. *It is agreed that one who knew of a ground of disqualification before or during the trial cannot present such objection for the first time after verdict, and he must actually show the want of such knowledge on his part.*

A. & E. Encyc 2nd Edit. Vol. 17, p. 1161, and cases cited, Note 5.

We have attempted to show heretofore that our statutes contemplate no such distinction between grades of

disqualification. And the case of Clinton vs. Englebrecht, 13 Wall., at page 445, holds that "the whole subject matter of jurors in the Territories is committed to Territorial regulation."

If there is any distinction to be made between disqualifications, it is simply between those that are constitutional and those that are statutory; and the one in question here we believe we have shown to be of the latter order.

Respectfully submitted,

J. C. ROBBERTS,

Attorney General.

C. H. WOODS, Assistant.

Supreme Court of the United States.

No. 246.—October Term, 1902.

Thomas P. Queenan, Plaintiff in Error, vs. The Territory of Oklahoma. } In error to the Supreme Court of the Territory of Oklahoma.

[June 1, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an indictment for murder upon which the plaintiff in error has been found guilty, and has been sentenced to be hanged. It comes here by writ of error to the Supreme Court of the Territory of Oklahoma, that court having decided that there was no error in the proceedings and having affirmed the judgment. 11 Okla. 261. The errors assigned will be taken up in the order in which they were argued.

1. The only defense was insanity. A lawyer, called as a witness for the defendant, stated that he knew the prisoner quite well; that the prisoner was his barber for some years, and that he saw him on the day before the killing. He then described the appearance and conduct of the prisoner, and said that at the time he did not notice any difference from the prisoner's usual demeanor. He then was asked if since the killing he had formed an opinion as to the prisoner's mental condition at that time. This opinion he was not allowed to state, and this is alleged as error. It will be seen that the witness was allowed to sum up his impressions received at the time. The court said in terms that he might state any condition that existed then or any impression that it made upon the witness's mind as to the prisoner's condition. That is all that was decided in *Connecticut Mutual Life Insurance Company* v. *Lothrop*, 111 U. S. 612. Some States exclude such opinions, even when formed at the time. But, as is pointed out in the case cited, it is impossible for a witness to reproduce all the minute details which he saw and heard, and most witnesses make but a meagre and halting effort. Therefore, in this as in many other instances, after stating such particulars as he can remember, generally only the more striking facts, an ordinary witness is permitted to sum up the total remembered and unremembered impressions of the senses by stating the opinion which they produced. To allow less may deprive a party of important and valuable evidence that can be got at in no other way. But, on the other hand, to allow more, to let a witness who is not an expert state an opinion upon sanity which he has formed after the event, when a case has arisen and become a matter

of public discussion, must be justified, if at all, on other grounds. It is unnecessary to lay down the rule that it never can be done, for instance, when the opinion clearly appears to sum up a series of impressions received at different times. *Hathaway* v. *National Life Insurance Co.*, 48 Vt. 335, 350. It is enough to say that, at least, it should be done with caution and not without special reasons. In this case the only knowledge shown by the witness was the familiarity of a man with his barber. So far as the evidence went, his present opinion might have been the result of interested argument, and, leaving such suggestions on one side, no reason of necessity or propriety was shown for the statement that would not have applied to any other man who had had his hair cut in the prisoner's shop. It does not appear that there was error in the ruling of the court.

2. The next error alleged is in the following instruction of the court:

"Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong and to comprehend and understand the consequences of his act is excusable for any act in reference to which his mind is in such weakened condition. But it is not every derangement of the mind that will excuse one from the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequences of such act, the law recognizes him as sane, and holds him responsible for such acts; and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life and was able to comprehend and understood the consequences of such act, then and in that event it will be your duty to find the defendant guilty of murder, as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

By § 1852 of the Oklahoma Statutes of 1893, "All persons are capable of committing crimes, except . . . all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." It was argued very earnestly that the latter part of the instruction added a second condition to acquittal by directing it if the jury found that the prisoner was not able to know that the act was wrongful, "and was not able to comprehend and understand the consequences of such act." But, on the other hand, the condition of a verdict of guilty was made to be a finding that the prisoner knew and understood that it was wrong to take the life, "and was able to comprehend and understood the consequences of such act." So that the most material part of the charge, that relating to conviction, was favorable to the prisoner. If it be supposed that such abstract language was

remembered and was nicely considered and analyzed by the jury, the total effect of the charge was that, unless the two conditions concurred, the prisoner must be acquitted. We do not mean to imply that any part of the instruction, fairly understood, was wrong, but for purposes of decision it is enough to say what we have said. The instructions asked and refused were covered by that which was given as stated above.

3. In the course of the trial the government announced that since the last adjournment it had been informed that one of the jurors, named, had been convicted in Nebraska of what, by the law of that State, was a felony, grand larceny, at a time and place mentioned, contrary to the statement of the juror on the voir dire. We assume, for the purposes of decision, that this disqualified the juror from serving in any case. Stat. Oklahoma, §§ 3093, 5182, 5183. The court asked the counsel for the prisoner what they desired to do, and its intimation indicated that if the objection were pressed the juror would be excused. This, of course, meant that the trial would have to be begun over again. The counsel for the prisoner answered that they had nothing to say, and the trial went on. It now is argued that the defendant was deprived of a constitutional right, which he could not waive. *Thompson* v. *Utah*, 170 U. S. 343. The contrary plainly is the law as well for the Territories as for the States. See *Kohl* v. *Lehlback*, 160 U. S. 293, 299 *et seq.*; *Raub* v. *Carpenter*, 187 U. S. 159, 164.

It is argued that the court could not have permitted a challenge at that time, because the statutes of Oklahoma, § 5177, provided that "the court for good cause shown may permit a juror to be challenged after he is sworn to try the cause, but not after the testimony has been partially heard." This statute cannot be construed as going merely to the order of procedure—as depriving a party of the right to challenge pending the trial, but as preserving the right for the purpose of a motion for a new trial. Either it does not apply to the case of a disqualification discovered, as this was, after a part of the evidence was in, or it purports to take away the right altogether. Whatever may be the true construction of the last clause, the court seems to have been ready to stop the trial. But if the court's view was wrong, if the statute is constitutional—as to which we do not mean to express a doubt—the prisoner had no right to complain, and if it is not, it was his duty to object at the time if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.